IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1054

SEALY, INCORPORATED, SEALY SPRING CORPORATION—INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.,

*Petitioners,*

*vs.*

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., AND SEALY MATTRESS COMPANY OF GEORGIA, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

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**No.**

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SEALY, INCORPORATED, SEALY SPRING CORPORATION—INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC., *Petitioners,*

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*Respondents.*

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### OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 585 F. 2d 821. The opinions of the district court (Appendices B and C) are unreported.

## JURISDICTION

The judgment of the court of appeals (Appendix A, p. A49) was entered on October 11, 1978. The jurisdiction of this Court is founded on 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED

1. Can the decision in *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), survive in light of the decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), so as to make it illegal per se for a group of small manufacturers who have developed a common trademark for a nationally-advertised product to use territorial restrictions in the sale of the trademarked product, although the group lacks market power and although the intrabrand restraints are essential to the important interbrand competition created by the trademarked product?

2. Can the "horizontal" ground for the per se rule of *United States* v. *Sealy, Inc.* survive as a basis for distinguishing the *Sylvania* ruling if this Court decides, in the pending *ASCAP* case (Nos. 77-1578 and 77-1583), that the rule of reason rather than a per se rule applies to a horizontal combination of copyright owners engaged in setting prices on competing copyrights under a blanket licensing arrangement?

## STATUTE INVOLVED

Section 1 of the Sherman Act, as amended, 15 U. S. C. § 1, provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

## STATEMENT

Sealy, Inc. is the owner of a number of trademarks relating to mattresses and other bedding products. It licenses these trade-



marks to a number of independent manufacturers who (with minor exceptions) own all of the stock of Sealy, Inc. Besides owning and licensing the Sealy trademarks, Sealy, Inc. provides a variety of advertising and technical services to its licensees and also manufactures and sells bedding products through several subsidiaries. The entire Sealy group has only about 20 per cent of the market for mattresses and other bedding products, approximately the same as that of Simmons (a company, not a group).[1] Respondent, Ohio-Sealy, is the largest member of the Sealy group, with about 4 per cent of the total bedding market. The 50 largest firms in the mattress manufacturing industry account for approximately 54 per cent of the total market.[2]

### United States v. Sealy, Inc.

The original license agreements between Sealy, Inc. and its manufacturer-licensees assigned each licensee a territory and forbade it to sell outside of its territory under the Sealy name. The licensee, was however, perfectly free to sell its products anywhere under its own name. The reason for the territorial restriction was to promote interbrand competition. The success of the Sealy group depends on each licensee's vigorously promoting the Sealy name. Such promotion is costly. If each licensee were permitted to sell in others' areas, licensees who incurred the costs of effectively promoting the Sealy name in their sales areas would be exposed to "free riding" by less diligent licensees. Another licensee might sit back, doing no advertising or promotion, and then, when other licensees had built up consumer demand for Sealy products, come in and reap the benefits of the other licensees' cultivation of consumer demand without having

1. 2 App. 143; 2 App. 526. Record references containing the abbreviation "App." refer to the Joint Appendix filed by the parties below.

2. U. S. Bureau of the Census, Census of Manufactures, 1972, Special Report: Concentration Ratios in Manufacturing, MC 721 (SR)-2, 1 App. 712.

incurred those costs himself. The result would be to diminish the competitive incentives for all licensees.

In addition to the territorial restriction, Sealy, Inc. had set minimum retail prices on the trademarked products and assisted its licensees in enforcing such prices under the state fair trade laws, for the similar purpose of preventing "free riding" at the retail level. *See*, Telser, *Why Should Manufacturers Want Fair Trade?* 3 *J. Law and Econ.* 86 (1960).

Despite the procompetitive reason for the restrictions, and the fact that the Sealy group's small aggregate market share made it highly improbable that their purpose was to curtail the supply and raise the market price of mattresses and other bedding products, the Department of Justice in 1960 brought suit charging Sealy, Inc. with having fixed prices and allocated markets in per se violation of Section 1 of the Sherman Act. The district court found that Sealy, Inc. had unlawfully set minimum retail prices and enjoined that practice. However, the court upheld the territorial restriction. The Department of Justice appealed, and in *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), this Court held that the territorial restriction in the licensing agreement was illegal per se. The Court reasoned that the resale-price and territorial restrictions together constituted an "aggregation of trade restraints" that was illegal per se because it was horizontal.

The Court reached these conclusions without considering the market power (if any) possessed by the Sealy group or the possible economic justifications for the restrictions. The Court could not have considered these factors even if it had wanted to. They had been excluded at trial because the government had chosen to proceed strictly on a per se theory.

On remand, a remedial decree was worked out between Sealy, Inc. and the government whereby Sealy was enjoined from restricting sales to prescribed territories. The government agreed to, and did, state to the district court upon entry of the



decree that it did not interpret the decree as prohibiting per se the use of manufacturing location clauses, area of primary responsibility clauses, or pass-over provisions. (*United States* v. *Sealy, Inc.*, 1967 Trade Cases ¶ 72,327 (N. D. Ill. 1967); 1 App. 380.)

Sealy, Inc. then amended its license contracts to eliminate exclusive territories and substitute areas of primary responsibility, manufacturing location clauses, and pass-over payments measured by the home licensee's advertising and promotion expenditures per unit of sale, as well as a small charge to cover potential warranty repairs the home licensee might be called upon to make. (1 App. 322.)[3]

**The Present Case**

The present case is a private treble-damage action brought in 1971 by Ohio-Sealy, one of the Sealy licensees, against Sealy, Inc., principally asserting that Sealy, Inc.'s successful acquisition of three licensees, in competition with the plaintiff who desired to purchase them, violated the Sherman Act.

In the wake of this Court's *Sealy* decision, Ohio-Sealy embarked on a program of trying to acquire other Sealy licensees, with the ultimate objective of acquiring control of the trademarks and forming an integrated national company.[4] Meanwhile Sealy, Inc. had also explored the possibilities of vertical integration, as

3. It is undisputed that since abandonment of the exclusive-territory clause, out-of-area sales have occurred in substantial and increasing volume, although the percentage of such sales to total sales is small. (1 App. 668-706.)

4. An Ohio-Sealy planning document suggested that "if sufficient properties were acquired, it would become not only attractive, but almost imperative, for the remaining licensees to exchange their stock for stock in a new corporation which would then own all of the properties as well as all of the outstanding stock of Sealy, Inc. Steps could then be taken to build an integrated national bedding operation. . . ." (1 App. 313-14.) To implement its plan Ohio-Sealy made a public offering of its stock and in that connection attempted to change its name to The Sealy Mattress Corporation without prior disclosure to Sealy, Inc. (PTX 641A; 2 App. 167, 193, 422; 1 App. 368.)

one means of preserving Sealy's competitive effectiveness in the interbrand market in the face of this Court's decision. (2 App. 202.)[5] When Ohio-Sealy began its acquisition program, Sealy, Inc. matched Ohio-Sealy's offers for three licensees under a right of first refusal contained in the Sealy license agreements, and prevailed as the purchaser.

Ohio-Sealy's suit against Sealy, Inc. charged that Sealy's exercise of the right of first refusal, and the ensuing acquisitions, represented a continuation of the territorial restrictions found illegal in *United States* v. *Sealy, Inc.* and were part of an effort to limit intrabrand competition. Pursuant to that theory, the jury was instructed that any license provisions, including the right of first refusal, which in combination restricted in any substantial way the geographic areas in which products might be sold were illegal per se under Section 1 of the Sherman Act. The jury found in favor of the plaintiff and awarded judgment in an amount which, trebled, exceeded $20 million. The trial judge remitted one-half of this amount, and the plaintiff accepted the remittitur.

The per se instruction given to the jury necessarily assumed the continued vitality of the *Sealy* decision of 1967. After the jury's verdict and the entry of judgment by the district court, however, this Court rendered its decision in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977). On appeal, Sealy, Inc. argued that the *Sylvania* decision had destroyed the premises on which the *Sealy* per se doctrine rested, requiring reversal of the district court's judgment. The court of appeals

5. Among other efforts, a plan was proposed, and submitted to the Justice Department, for the merger of twelve of the then nineteen licensees into Sealy, Inc. A Business Review letter giving clearance to the plan was issued by the Department. The plan was not consummated, in part because the filing of Ohio's lawsuit adversely affected the marketability of the Sealy stock. (PTX 303; PTX 933; PTX 934; 1 App. 313; 2 App. 791-92.)



recognized the propriety of the argument[6] but rejected it on the merits. Relying on a footnote in the *Sylvania* opinion (433 U. S. at 58 n. 28), the court concluded that *Sylvania* had "expressly reaffirmed the appropriateness of the per se rule for horizontal territorial limits. . . ." (A16, *infra.*) Accordingly, the court of appeals declined to re-examine the appropriateness of a per se rule for this case and affirmed the judgment of the district court.[7]

## REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted in order to resolve the fundamental inconsistency between this Court's decision in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977) and the Court's earlier decision in *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967). In *Sylvania* the Court announced principles for the application of the antitrust laws to intrabrand restraints that are irreconcilable with the per se approach adopted in the *Sealy* decision. To perpetuate the discordant results in these two cases, involving economically indistinguishable practices, can only obstruct the rational development of antitrust law and hinder competitive efforts on the part of small firms. Only this Court can resolve the uncertain status of the *Sealy* precedent resulting from the *Sylvania* decision.

*United States* v. *Sealy, Inc.* was a companion case to *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967).

6. Sealy did not object at trial to the substance of the per se instruction. The court of appeals acknowledged, however, that Sealy was entitled to the benefit of any intervening change of law prior to the appeal, and that Sealy's argument based on the *Sylvania* case was properly to be considered in support of Sealy's motion for judgment n.o.v.

7. The court of appeals also suggested that even if the per se theory was erroneous the jury might have found a violation under the rule of reason. (A 17, *infra.*) This Court has made it clear that a general verdict cannot be sustained if one theory on which the case was submitted to the jury was improper. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29-30 (1962).

*Schwinn* held that it was illegal per se under Section 1 of the Sherman Act for a manufacturer to assign exclusive sales territories to its distributors. *Sealy* held that it was illegal per se for a trademark licensor owned by a group of small mattress manufacturers to assign exclusive territories to its manufacturer-licensees for the sale of the trademarked product. Ten years later, in the *Sylvania* case, the Court expressly overruled *Schwinn*. The Court held in *Sylvania* that a manufacturer's territorial restrictions on its distributors are to be judged by the rule of reason rather than a per se rule because they may promote interbrand competition—"the primary concern of antitrust law" (433 U. S. at 52 n. 19)—more than they limit the less important intrabrand competition. In so holding, the Court recognized the importance of the "free-rider" effect in reducing the effectiveness with which a manufacturer's brand may be promoted, and hence in limiting the effectiveness of interbrand competition. At the same time the Court emphasized the importance of functional analysis in the sound application of the antitrust laws, and deprecated the use of per se rules to condemn practices not shown to have any "pernicious effect" on competition and to "lack any redeeming virtue."

The decision in *United States* v. *Sealy, Inc.*, like that in the companion *Schwinn* case, ran directly counter to these precepts. Both rested on "formalistic" grounds rather than functional analysis. Both condemned territorial restraints having the purpose of increasing interbrand competition by encouraging the promotion of a single brand. And both represented abrupt departures from the proper scope of per se rules as laid down in the *Northern Pacific* case. (*Northern Pacific Railway Company* v. *United States*, 356 U. S. 1 (1958).)

The reasoning in the two cases was equally contrived, though somewhat different. In *Schwinn*, the Court based its holding that the territorial restrictions were illegal per se on the view that they violated the ancient rule against "restraints on alienation." This ground was unavailable in *Sealy*



since Sealy, Inc. did not sell mattresses to the licensees but rather licensed manufacture under the Sealy name. In *Sealy* the Court linked the territorial restrictions to the (already enjoined) resale price maintenance in an "aggregation of trade restraints" which was illegal per se because "horizontal." However, since the resale price maintenance could be, and had been, separately enjoined, its past use could not realistically have been considered dispositive of the territorial issue.[8] As for the "horizontality" of the territorial restriction in *Sealy*, it is plain that Mr. Justice Fortas himself considered this factor as less than dispositive. Otherwise he would not have had to invoke the "aggregate of trade restraints" notion, since it was already well settled that a division of markets among independent competing firms is illegal per se whether or not price restrictions are also imposed.

Neither the "horizontal" characterization relied on by the opinion in *Sealy* nor this Court's footnote reference to horizontal restraints in the *Sylvania* opinion, relied on by the court below, can satisfactorily dispel the conflict between the rationale of *Sylvania* and the result in *Sealy*.[9] The label "horizontal" is not

8. By a footnote in its subsequent decision in the *Topco* case, the Court discarded this element of the *Sealy* opinion. *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, at 609 n. 9 (1972).

9. The *Sylvania* footnote (433 U. S. at 58 n. 28) failed to cite *United States* v. *Sealy, Inc.*, even though its companion case was being overruled. It did cite *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), a case resembling *Sealy*, and in which the decision relied on *Sealy*. *Topco* is distinguishable, however, on the grounds, as noted in *Sylvania*, that it involved "a horizontal restriction among ostensible competitors." (433 U. S. at 57, n. 27.) The Sealy licensees were not ostensible competitors but, to the public, appeared as parts of a single firm. *Cf. United States* v. *Citizens and Southern National Bank*, 422 U. S. 86 (1975). The joint-trademark products in *Topco* represented only 10% of the merchandise sold by the participating retailers. Thus the territorial restraints had a clear potential for restricting competition unrelated to the promotion of the joint trademark, a fact that might well justify use of a per se rule in *Topco* though not in *Sealy*. To the extent that the *Topco* decision relied on *Sealy*, however, its rationale is open to the same criticism, in the light of *Sylvania*, as the *Sealy* decision. Compare the dissenting opinion of Chief Justice Burger in *Topco*.

a universal talisman. It is not always self-applying, as the Court noted in the *Sylvania* opinion. (433 U. S. at 58 n. 28.)

Both *Schwinn* and *Sylvania* involved "horizontal" restrictions in the sense that their effect was to eliminate competition—horizontally—between dealers in Schwinn and Sylvania products. Joint ventures and mergers between competitors are also "horizontal" but they are not deemed illegal per se. They are judged under essentially the same standards *Sylvania* makes applicable to vertical restraints. Sealy, Inc. was in fact described in the *Sealy* opinion as a joint venture of its licensees (388 U. S. at 353) and the joint venture was assumed to be in itself legal.[10] If all of the licensees had merged with Sealy, Inc., the merger would not have been judged under a per se rule. Indeed, subsequent to the *Sealy* decision, the Department of Justice gave clearance to a merger plan involving the merger of twelve of the then nineteen Sealy licensees with Sealy, Inc. If the venture itself was legal, and if even a merger of its members would not be judged by a per se test, it makes no sense to apply a per se rule to partial and ancillary restraints that may be essential to the success of the joint venture—or to condemn per se, as in this case, the exercise of a right of first refusal used to effect a vertical integration.

The scholarly commentary on the *Sylvania* decision supports our contention that compels re-examination of *United States* v. *Sealy, Inc. See,* Weisberg, *Continental TV* v. *GTE Sylvania: Implications for Horizontal, as Well as Vertical, Restraints on Distributors,* 33 The Business Lawyer 1757 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. of Chi. L. Rev. 1, 9-10 (1977); Note, *GTE Sylvania: An Excursion Into The Labyrinth,* 9 Rutgers Camden L. J. 502 (1978); Handler, *Changing Trends In Antitrust Doctrines: An Unprecedented Supreme Court Term—1977,* 77 Colum. L. Rev. 979, 987 (1977).

10. The Government had conceded, as the District Court had found, that Sealy existed for lawful purposes and was not a mere facade for a cartel. Govt. Brief, p. 12; *see,* 388 U. S. at 360-61 (dissenting opinion of Harlan, J.).



The question whether *United States* v. *Sealy, Inc.* has survived *Sylvania* is squarely presented by this case, since Sealy, Inc. obviously could not be found to have engaged in a per se violation merely for employing partial territorial restraints if even an absolute restraint would not be illegal per se.

Re-examination of the *Sealy* rule is especially appropriate in this case, because the decision below vividly illustrates the dangers of per se rules emphasized by the *Sylvania* opinion. The paradox resulting in this case from the per se doctrine of *United States* v. *Sealy, Inc.* is this: A number of small local manufacturers unite to develop a uniform product in order to compete in a national market. Their efforts over many years create a product of high quality that becomes a major force in the interbrand market. Merely because of their continued ownership of the trademarks and organization they have created, this Court declares them to be engaged in an illegal horizontal combination. The licenses are modified in a manner clearly contemplated by an agreed remedial decree. The owners then embark on a program of vertical integration to eliminate the structural "horizontality" which underlay the Court's finding of per se illegality. One of their number, perceiving the same logic of the Court's reasoning, embarks on a similar course. With no advantage but a concededly lawful right to meet another's offer, the original owners of the trademarks acquire the businesses of three licensees who wish to sell out. The disappointed would-be purchaser casts itself in the role of a victim of antitrust violations, and the doctrine of *United States* v. *Sealy, Inc.* is applied to condemn the very effort to escape the "illegality" found in that decision. Thus a pro-competitive enterprise of small manufacturers, conceived to enable them to compete successfully against large integrated firms, is impaled on both horns of a dilemma unwittingly created by a too-facile per se rule.

Nothing, we submit, could better confirm this Court's prediction in *Sylvania* that per se rules in this area "may work to the ultimate detriment of the small businessmen who operate as franchisees." (433 U. S. at 57 n. 26.)

2. Certiorari should be granted for the additional reason that this Court's grant of certiorari in the *ASCAP* case[11] compels a re-examination of the per se rule as to horizontal restraints that may have an important bearing on the continued vitality of *United States* v. *Sealy, Inc.*

The fundamental issue in the *ASCAP* case is the same as the issue which, we submit, was erroneously decided in the *Sealy* case—namely, whether the classic per se doctrine against horizontal restraints applies to joint ventures formed for pro-competitive or efficiency-creating purposes or whether, on the other hand, that doctrine is properly confined to naked agreements among independent competitors, that have no purpose other than the elimination of competition.

ASCAP is a "horizontal" combination of competing copyright owners. In issuing blanket licenses to copyright users, ASCAP is necessarily engaged in "horizontal" price-fixing of license fees for copyrights. The court of appeals in that case, applying the per se rule against horizontal price-fixing, held that the issuance of such blanket licenses was illegal per se. If this Court upholds the blanket licensing arrangement, its decision will necessarily complete the dismantling of the *Sealy* decision which the *Sylvania* decision logically requires. It will eliminate all basis for treating the territorial restrictions of Sealy, Inc. as illegal per se merely because they are "horizontal."

The proper domain of the per se rule against horizontal market divisions is illustrated by *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951), where independent competitors divided the market into exclusive territories so as to

11. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, No. 77-1578; *American Society of Composers, Authors and Publishers* v. *Columbia Broadcasting System, Inc.*, No. 77-1583.



achieve the same effects as a price-fixing agreement—the elimination of interbrand competition. Such agreements are clearly distinguishable from a genuine joint venture, among firms having in the aggregate no market power, formed for the purpose of enabling small manufacturers to achieve efficiencies in the marketing of a uniform product in competition with large integrated firms. The distinction is that between a naked agreement to restrain competition and a partial integration or unification—in effect, a partnership for limited purposes—accompanied by ancillary restraints.

That distinction is supported by the United States as *amicus curiae* in the *ASCAP* case. In his brief urging reversal of the court of appeals' decision in that case, the Solicitor General argues that the horizontal per se rule has its proper application to "naked restraints" as in the "mine run cartel" case, that "not every joint or collaborative action that may affect price is unlawful *per se*," and that an agreement among competitors to market a product different from anything they could market individually is not properly within the per se rule. (Brief for the United States as Amicus Curiae, pp. 15, 16, 19.)

If the Solicitor General's position prevails in the *ASCAP* case, and ASCAP's licensing arrangements are to be judged by the rule of reason, the per se rule of *United States* v. *Sealy, Inc.* cannot stand. The ancillary territorial restrictions involved in *Sealy* and the instant case represent an *a fortiori* case for application of the rule of reason. In sharp contrast to ASCAP, the Sealy joint venture lacks market power; it involves no pooling of competing trademarks and thus no restraint in the interbrand market; it involves no price-fixing. And like ASCAP, the Sealy joint venture was formed to permit the marketing of a new product—a national brand—which none of the members could market individually and to perform services that could not efficiently be performed by the members acting alone.[12]

12. ASCAP and Sealy are identical in a further respect. In *ASCAP*, the per se illegality found by the court of appeals could

(Footnote continued on next page.)

Certiorari should be granted, therefore, to avoid the incongruity of a decision in the pending *ASCAP* case that would apply the rule of reason to blanket licensing of competing copyrights by a joint venture with great market power, while perpetuating a per se rule for lesser restrictions imposed by a joint venture engaged in licensing a trademark jointly owned by a group of manufacturers lacking market power.

**CONCLUSION**

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 29, 1978.

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(Footnote continued from preceding page.)
not have existed had all the copyright owners sold their copyrights to a single owner. Similarly in Sealy the per se illegality found in *United States* v. *Sealy, Inc.* would not have existed had the trademark owners sold their rights to a single owner. But no conceivable antitrust purpose could be served by requiring the originators of the copyrights or the trademarks to divest themselves of ownership of their rights to a single owner.

# APPENDIX

## APPENDIX A.

### OPINION OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER 11, 1978

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 77-1239 & 77-1240

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, INC., and SEALY MATTRESS COMPANY OF GEORGIA, INC.,
*Plaintiffs-Counterdefendants/Appellants-Cross-Appellees,*

*vs.*

SEALY, INCORPORATED, SEALY SPRING CORPORATION—INDIANA, SEALY SPRING CORPORATION—EAST, SEALY SPRING CORPORATION—WEST, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SCHNORR MANUFACTURING COMPANY, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., SEALY MATTRESS COMPANY OF PHILADELPHIA, INC.,
*Defendants-Counterplaintiffs/Appellees-Cross-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois.

No. 71 C 1243—James R. Parsons, *Chief Judge.*

ARGUED APRIL 20, 1978—DECIDED OCTOBER 11, 1978

Before FAIRCHILD, *Chief Judge*, MOORE, *Senior Circuit Judge*,* and PELL, *Circuit Judge*.

PELL, *Circuit Judge*. Sealy, Incorporated (Sealy) owns trademarks for the "Sealy" brand of mattresses, mattress foundations, and other bedding products. The Sealy brand enjoys substantial national consumer popularity, and Sealy licenses its trademarks to fifteen independent manufacturers, each of which has the primary responsibility to make and sell Sealy products in a defined territory or territories. Sealy receives license royalties, provides uniform product specifications, and also provides for the benefit of its licensees substantial national advertising, product development services, engineering assistance, sales training, and a means of central negotiation for selling to national retail organizations and purchasing certain mattress components. In addition, Sealy itself manufactures and sells mattresses in seven territories, and it also manufactures spring units through three wholly-owned subsidiaries.[1] Over 98% of the stock of Sealy is owned by its licensees, only licensees (or their nominees) are eligible for 11 of the 14 seats on Sealy's Board of Directors, and the Board's Executive Committee is composed exclusively of licensees.

Ohio-Sealy Mattress Manufacturing Company (Ohio) is a Sealy licensee with primary responsibility for six territories. Ohio is the largest and one of the best of the Sealy licensees, producing a high quality product efficiently, selling it effectively, and compiling an enviable profit record.[2]

In *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), the Supreme Court invalidated the system of exclusive manufacturing and sales territories on which Sealy then predicated its

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

1. The subsidiaries through which Sealy makes and sells mattresses in its seven territories and makes spring units were also named as parties to this action.

2. Ohio services five of the territories through four subsidiaries, which are also parties herein.



licenses. (Sealy at the time was not itself engaged in manufacturing mattresses.) Looking at "substance rather than form," *id.* at 352, the Court thought it clear that the exclusive territories were restrains imposed by a horizontal combination of potential competitors, because Sealy was obviously "a joint venture of, by, and for its stockholder-licensees [who are] themselves directly, without even the semblance of insulation, in charge of Sealy's operations." *Id.* at 353. Because the exclusive territory system operated to give each licensee an enclave free from the competition of other Sealy licensees, it amounted to an allocation of markets *per se* violative of Section 1 of the Sherman Act, 15 U.S.C. § 1,[3] without regard to asserted justifications for the system.[4]

After the Supreme Court's decision, Sealy revised its licensing agreement, eliminating exclusive selling territories. In 1971, Ohio initiated this action, complaining that Sealy had continued to effect the evils the Supreme Court condemned, albeit by more subtle means, that Sealy's methods of dealing with national retail customers also violated the Sherman Act, and that Sealy was engaged in illegal tying and price fixing arrangements regarding certain mattress components. Damages well in excess of $6,000,000 were claimed, and declaratory and injunctive relief was sought. Sealy counterclaimed, seeking substantial damages and other relief.

The damage claims of the parties were tried before a jury over a period of four months in 1974 and 1975. Although both Sealy and Ohio had several objections to the jury's instructions,

3. As pertinent, § 1 provides:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

4. The district court in *Sealy* had found and enjoined a conspiracy to fix minimum retail prices, and no appeal was taken from its judgment order in that respect. While the Supreme Court pointed out the nexus between this price fixing and the allocation of markets, 388 U.S. at 355-58, it is clear that the latter element is illegal *per se* even though the former element is absent. *See id.* at 357 n.5; *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609 n.9 (1972).

no complaint thereof is made on appeal. Ohio's evidence indicated damages on its complaint of $9,233,563 (before trebling, *see* Section 4 of the Clayton Act, 15 U.S.C. § 15). Sealy's counterclaim evidence indicated damages of $14,701,479. The jury rendered a general verdict for Ohio on its complaint, awarding damages of $6,814,852, and against Sealy on its counterclaim. Thereafter, the district court denied Sealy's motion for judgment n.o.v., and denied its motion for a new trial conditionally on Ohio's accepting a remittitur of 50% of its $20,444,556 trebled damages. Ohio accepted the remittitur. After later hearings on equitable relief, the district court denied it. The court also ruled that Ohio was not entitled to interest on its judgment for the twenty-month period between the jury's verdict and the court's entry of final judgment in the case. Ohio appeals from the judgment's denial of equitable relief and interim period interest, and Sealy cross-appeals from the denial of its motions for judgment n.o.v. and for a new trial.

A fuller statement of the pertinent facts of the case will be given in the context of the issues presented for decision.

I. *Sealy's Motion for Judgment Notwithstanding the Verdict.*

If Sealy is correct that the district court should have granted its motion for judgment n.o.v., most of the rest of the issues on appeal will be academic.[5] Accordingly, we consider this possibility first. In doing so, we are guided by the "well established" rule that

> a motion for a directed verdict or for judgment n.o.v. is properly denied where the evidence is such that reasonable men in a fair and impartial exercise of their judgment may draw different conclusions therefrom.

5. An exception would be Ohio's prayer for equitable relief. All of the elements of Ohio's complaint were in issue in the jury trial, so if there was insufficient evidence of antitrust violations to warrant submission of the case to the jury, equitable relief would obviously be foreclosed. If, on the other hand, judgment n.o.v. should have been granted on the ground that no recoverable damages were proved, equitable relief could nonetheless be appropriate.



*Hannigan* v. *Sears, Roebuck and Co.*, 410 F.2d 285, 287 (7th Cir. 1969), *cert. denied*, 396 U.S. 902; *see also Fontanna Aviation, Inc.* v. *Beech Aircraft Corporation*, 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971). We are

> bound to view the evidence in the light most favorable to [Ohio] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.

*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) (footnote omitted); *accord, Hannigan, supra* at 288. This is particularly true in complex antitrust cases such as this one "where motive and intent play leading roles," *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), because "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses" by the trier of fact. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Lambert Corporation* v. *Evans*, No. 76-2287 (7th Cir. April 20, 1978), slip op. at 7.

Ohio argues, as a threshold matter, that judgment n.o.v. was absolutely precluded by Sealy's failure to file a motion for directed verdict "at the close of all the evidence," which Rule 50(b), Fed. R. Civ. P., makes a necessary predicate of a later motion for judgment n.o.v. Sealy's directed verdict motion was made at the close of its case, *i.e.*, after all but certain rebuttal evidence was taken. The motion was not thereafter renewed, but we agree with the district court that Sealy adequately preserved its right to a ruling on the sufficiency of Ohio's evidence. The application of Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for the truth." *Pittsburgh-Des Moines Steel Co.* v. *Brookhaven Manor Water Co.*, 532 F.2d 572, 576 (7th Cir. 1976); and *see* Rule 1, Fed. R. Civ. P.

Rule 50(b) serves the important purpose of ensuring that a motion for judgment n.o.v. is used only to invite the district

court to reexamine its decision not to direct a verdict as a matter of law, and not, in contravention of the Seventh Amendment, to reexamine facts found by the jury. *Pittsburgh-Des Moines, supra* at 576. Where the court's attention is directed to a party's contention that the pertinent evidence presented entitles it to judgment as a matter of law, the motion's purpose is served. *Moran* v. *Raymond Corp.*, 484 F.2d 1008, 1014 (7th Cir. 1973), *cert. denied,* 415 U.S. 932 (1974). Nor does the introduction of additional evidence after a directed verdict motion necessarily call for a different conclusion, especially where, as here, the district court expressly determines that "there was no probability that any evidence presented during rebuttal and/or surrebuttal could have prompted this Court to grant any motion for a directed verdict." *See Moran, supra* at 1012; *Gillentine* v. *McKeand*, 426 F.2d 717, 722 (1st Cir. 1970).

Another purpose of Rule 50(b) is avoidance of making a trap of a motion for judgment n.o.v. where, *e.g.*, a directed verdict motion would point out a defect in proof that the opposing party might remedy thereafter. *Pittsburgh-Des Moines, supra* at 576. There was no possibility of any such trap here, where the directed verdict motion came after both parties rested their cases in chief. Any additional proof which Ohio could properly introduce on rebuttal was in no way foreclosed, and no suggestion is made that the motion for judgment n.o.v. hinged in any material way on Ohio's lack of rebuttal evidence or Sealy's surrebuttal proof.[6] We conclude, as did the district court, that under this court's "liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment," *Moran, supra* at 1014,

6. Ohio argues that a trap was created, because Sealy agreed to instructions inconsistent with legal arguments made in this court. This argument, even if true, bears no relationship to the question under consideration. Rule 51, Fed. R. Civ. P., forecloses objections on appeal to agreed instructions and unless, as Sealy argues, the controlling law has clearly changed, Sealy can gain no advantage from the "trap" Ohio says it attempted to lay.



Sealy is entitled to have its attack on the sufficiency of Ohio's evidence heard on the merits.

A. Market Allocation

The evidence in the case would clearly have allowed a jury to find the following facts with reference to Ohio's claim that Sealy was engaged in a scheme of market allocation. Soon after the Supreme Court's decision in *United States* v. *Sealy, Inc.*, Sealy's Board of Directors met to consider Sealy's future operations. Concern was expressed over the invalidation of the exclusive territory system, and the resulting dangers from the competition of "renegade," "out of control," "predatory" licensees, and from retailers which might attempt to play licensees off against each other to obtain lower prices. In conjunction with antitrust counsel, Sealy began the process of working out alternatives to preserve as much of the perceived benefit of its former system as the Department of Justice and the courts would allow in the light of the Supreme Court decision.

The final decree entered in *United States* v. *Sealy, Inc.*, 1967 Trades Cases ¶ 72,327 at 84,855 (N.D.Ill. Dec. 26, 1967), enjoined Sealy and its licensees from any arrangement "to limit or restrict any manufacturer in any substantial way to sales of Sealy products within a prescribed territory." *Id.* at 84,856. At the proceeding during which the decree was signed, John Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice, made the following statement about the pertinent language of the decree:

> We do not interpret this language as prohibiting per se the employment of manufacturing location clauses, areas of primary responsibility clauses, or pass-over provisions. In so saying, we are in no way implying any view as to the legality of such clauses under the antitrust laws, nor, of course, are we suggesting that such clauses would not violate the decree if they have the effects proscribed by [its] language.

With this background, Sealy developed a new license agreement (including each of the provisions mentioned by Mr. Sarbaugh and more) which was signed by all of Sealy's licensees, with one exception.[7] The new 1968 license agreement[8] maintained the same territories as had been used before, with Sealy promising not to license anyone else to manufacture Sealy products in a licensee's territory. The territories, however, were no longer to be exclusive as to sales. While each licensee was assigned primary responsibility to promote Sealy sales in his area, it also had the right to sell Sealy products in the territories of other licensees. Each licensee was to be held accountable for satisfactory performance in its area of primary responsibility (APR), and, as an incentive thereto, the contract provided that once the licensee achieved a certain sales quota in its APR, its royalties on all subsequent Sealy sales that year (inside or outside his APR) would be halved. Licensees were authorized to manufacture Sealy products only at the location(s) specified in their agreements and such additional locations as Sealy might thereafter approve in writing. Licensees were obliged to pay royalties on all products manufactured in licensed plants, whether or not the products were sold under a Sealy name. Products bearing the Sealy name, not surprisingly, were subject to higher royalty rates. In addition to the normal royalties, if a licensee sold Sealy products outside its APR it was subject to two additional charges. First, it would pay Sealy (and Sealy would thereafter pay the licensee whose APR was "invaded") pass-over payments equal to the percentage of the out-of-APR sales corresponding to the invaded licensee's prior year advertising and promotion expenses divided by that licensee's total sales. The

7. The southern California licensee successfully maintained a declaratory judgment action before the same district court judge who tried the present action, establishing that invalidation of the exclusive territory system did not nullify his prior contract in toto. *Sealy Mattress Co. of Southern California* v. *Sealy, Inc.*, 346 F.Supp. 353 (N.D.Ill. 1972). Sealy thereafter acquired the licensee's business.

8. The agreement was revised in 1971 and subsequently without changes pertinent to the present discussion.



precise amount of pass-over payments could not be predicted in advance in any given instance, but testimony indicated the range of payments could be from 2.2% to 11%. An additional charge was made for product service repairs on out-of-APR sales, amounting to 1% at the time of trial.[9] Sealy was to have a right of first refusal should a licensee wish to sell its business. Licensees were forbidden to acquire any interest in any competitive organiztion, although this provision apparently would not preclude a licensee from manufacturing and selling competitive private brand merchandise through a subsidiary.

Ohio's theory of its case was that although many or all of the provisions to which we have just referred might be legal in and of themselves, they were designed and used by Sealy in *per se* violation of the Sherman Act to achieve a division of markets. In addition to receiving a Rule of Reason instruction pertaining to all aspects of Ohio's case, the jury was told that market allocation is *per se* illegal, and that the above restrictions were not themselves *per se* illegal unless used to achieve a market allocation, *i.e.*, to limit or restrict "in any substantial way, the geographic areas in which products may be sold." Because the jury awarded damages vastly in excess of those claimed for the other aspects of Ohio's case, it necessarily found that Sealy had allocated markets. Deferring for later consideration Sealy's arguments that the evidence shows no injury and no antitrust damages to Ohio, we think it plain that the district court did not err in allowing the jury to decide whether or not Sealy had illegally divided markets.

In assessing the evidence making a jury question of market allocation, we bear in mind the horizontal nature of the restraints involved. As we have pointed out, the Supreme Court's decision in *United States* v. *Sealy, supra,* expressly held that the structure of the Sealy organization mandated the conclusion that its arrangements were horizontal ones. That structure, as pertinent,

9. The 1968 contract had set the charge at 50 cents per piece on all mattresses and box springs sold outside the APR.

stands unchanged now. Sealy half-heartedly argues that the fact that it now itself manufactures and sells in certain territories introduces elements of verticality to the picture, but we cannot agree. Whatever may be said about the way Sealy conducts its business in those territories, it is indisputably clear that any restraints applied to the independent businesses which are licensees result directly from the concerted action of their horizontal potential competitors. Accordingly, as Sealy agreed by accepting the district court's instructions on market allocation, if Sealy's license agreement and its conduct thereunder amounted to substantial limitations on manufacturers' sales territories, a *per se* violation existed. *See Topco, supra; Sealy, supra; Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899).

We also emphasize that Sealy's approach to the alleged restraints misses the mark. Repeatedly, Sealy argues that, *e.g.*, areas of primary responsibility, exclusive manufacturing licenses, location clauses, pass-over payments, rights of first refusal, etc., have all been held at one time or another not to violate the antitrust laws. That is certainly true enough, but we know of no authority holding that these devices, alone or in conjunction, do not violate the antitrust laws *even though they have effects plainly within the ambit of those laws.* On the violation issue, Sealy consistently refuses to address what was obviously Ohio's case theory, on which the jury was appropriately instructed in agreed language. It is thoroughly establishd that "[a]cts which may be legal and innocent in themselves, standing alone, lose that character when incorporated into a conspiracy to restrain trade." *Kurek* v. *Pleasure Driveway and Park District of Peoria*, 557 F.2d 580, 587 (7th Cir. 1977), *judgment vacated*, ........... U.S. .........., 46 U.S.L.W. 3664 (April 24, 1978), *judgment reinstated*, No. 76-1791 (7th Cir., September ....., 1978) (per curiam); *see Simpson* v. *Union Oil Co. of California*, 377 U.S.



13 (1964); *Poller* v. *Columbia Broadcasting System, Inc., supra*, 368 U.S. at 468-69. Moreover, in antitrust cases

> plainttiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

*Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra*, 370 U.S. at 699 (citation omitted).

Ohio proved that the mattress business is substantially local in nature, because of the bulk and weight of the product, the fact that retailers typically do not care to warehouse the product, and the need for frequent customer sales calls. As Sealy concedes, the great majority of mattress sales are made within 200-300 miles of a manufacturing plant. Exclusive manufacturing territories in the mattress industry thus tend to have the effect of limiting to some degree the areas in which any licensee can effectively compete. The jury was not instructed, however, that this effect alone would suffice to constitute an antitrust violation, and, indeed, Ohio does not attack Sealy's exclusive manufacturing area system, except in those limited cases where a significant market is left inadequately served by a licensee's refusal to locate a plant in proximity thereto.[10]

The local nature of the mattress business and the exclusive manufacturing areas used by Sealy really do little more than set the stage for the balance of the restrains attacked. Any licensee could, *e.g.*, engage in significant intrabrand competition at least with his neighboring licensees if Sealy's restrains went no further. But Sealy did go further, as we have said. It limited its licensees to manufacturing at specified locations. While no one from Sealy squarely admitted it, the jury could have found from Ohio's evidence that the purpose of this provision—which did

10. Evidence indicated that the St. Louis market, currently served by the Memphis licensee from a plant in Memphis, is such an instance.

not exist at the time of the Supreme Court's decision—was to prevent aggressive licensees like Ohio from locating plants near the periphery of their APR's, from whence they could compete effectively against neighboring licensees. The evidence also supported the conclusion that Sealy used the clause against Ohio in 1970 and 1973 to achieve exactly that purpose, when Ohio twice sought permission to locate a plant at Toledo, and Sealy twice denied it, at least partly in order to protect the interests of the Detroit licensee.

The degree to which Sealy licensees could effectively compete with each other from their fixed central locations was necessarily reduced by the charges Sealy imposed on out-of-APR sales. Taking the less onerous charge first, Sealy required licensees to pay 1% of out-of-APR sales to cover product service repairs made by "invaded" licensees. Although the original conception of this charge involved its being paid to Sealy to hold in a fund from which to compensate licensees who actually provided such repairs, in execution the charge was paid over to "invaded" licensees whether or not they ever repaired a single mattress. Ohio's evidence indicated that any such repairs were typically made by the selling licensee, and Sealy's president admitted that quality control on Sealy products was so good there were seldom product service repairs required, and that he saw little legitimate purpose in the 1% charge. The jury could have found it exacted a 1% tax on exercise of the "right" to sell outside a licensee's APR.

Sealy also imposed pass-over payments, supposedly designed to prevent an out of territory licensee from taking a "free ride" on an APR licensee's efforts and expenses to develop the Sealy name in its APR. Like the product service repair charge, pass-over payments have a plausible theoretical justification. The jury could nonetheless have found from the evidence that the payments unjustifiably served as a barrier to intrabrand competition. Ohio's economic expert, Dr. Willard F. Mueller of the University of Wisconsin, formerly and for many years the Chief Economist and later the Chief of the Bureau of Economics at the Federal Trade Commission, told the jury that the function of developing consumer preference for Sealy products was almost exclusively performed by Sealy's national advertising program, and that local advertising was designed primarily to increase local sales. A prime example of the type of advertising expense incurred locally was a cooperative advertising program for retailers, who ran local newspaper advertisements to attract customers to a bedding sale, very possibly featuring other brands as well as Sealy products. Even if there were some "free rider" effect from such advertising, the jury could easily have found that compensating an "invaded" licensee to the full proportionate extent of all his advertising and promotion expenses went much further than needed for the limited articulated purpose. The possible dampening effects on competition of pass-over payments that could run as high as 11% must have been obvious to the jury. Dr. Mueller testified that in fact the pass-over payments and the product service repair charges created barriers that made it very difficult to compete effectively outside the APR. He also testified that the expectation derived from his substantial experience would have been that significant intraband competition would have developed after the Supreme Court in validated Sealy's exclusive territories, but that no significant amount of such competition existed.[11]



11. Indeed, as much as Sealy emphasizes its figures on the amount of sales out-of-APR to show that such sales were in fact quite possible, the figures do not contradict Dr. Mueller's conclusions. Between 1969 and the first six months of 1976, Ohio did make millions of dollars of out-of-APR sales, but the record would amply support the conclusion that Ohio was the kind of licensee that was likely to make the best of even a very restrictive situation. The fact that Ohio overcame the obstacles to some degree in no way proves that it was not significantly impeded in making even more sales in intrabrand competition. Moreover, analysis of out-of-APR sales by licensees other than Ohio is quite telling. Notwithstanding that in at least one extended market area, the densely populated northeast, there are many city markets within less than 200 miles of numerous licensees' plants, less than .0042 of Sealy sales were made in the 1969-1976 period out-of-APR. Although, as Sealy points out, there

(Footnote continued on next page)

As we have indicated, Sealy inserted in its license agreements a provision giving it a right of first refusal before a licensee sold its business. Once again, this is a contract term inoffensive in itself, that the jury, however, could have found to have been used to perpetuate enclaves relatively free from intrabrand competition. Sealy had a right to veto a proposed sale of a licensee's business on objective business grounds, but it never invoked that provision when Ohio sought to acquire another licensee's business, because Ohio is obviously a well-qualified licensee. Instead, although the right of first refusal had never been exercised against anyone else, it was exercised five times against Ohio. In late 1970 and early 1971, Ohio contracted to acquire the Philadelphia licensee. After the neighboring Baltimore licensee (a member of Sealy's Board of Directors, and of the Board's Executive Committee) complained, Sealy exercised its right of first refusal, and the Philadelphia licensee withdrew the business from sale, as was its right. In 1972, the scenario was repeated, but this time Sealy succeeded in acquiring the business. In mid-1970, Ohio sought to acquire the Florida licensee, Sealy announced its intention to exercise its right of first refusal (after complaint by a neighboring licensee director), and the business was withdrawn from sale. In 1972, Ohio again sought the Florida business. Despite feelings that the price was too high, Sealy blocked Ohio's efforts to acquire the Pittsburgh licensee and acquired it for itself. In all three instances, the businesses acquired have lost money since Sealy bought them.

To be sure, Sealy had a more legitimate explanation of its exercises of the right of first refusal. It took the position at trial that the Supreme Court decision spurred bona fide interest in reconstituting Sealy as a national integrated vertical manufac-

(Footnote continued from preceding page)

appears to be a trend to increased amounts of such sales, the pertinent figures for 1974, 1975, and the first six months of 1976 were only: less than .009, less than .012, and approximately .007, respectively.



turer/distributor of bedding.[12] (The Court had distinguished *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), where it held that vertically imposed territorial limits were not subject to the *per se* rule, 388 U.S. at 354; and *see Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and such limits practiced by a vertically integrated supplier would seem to be an *a fortiori* case if, indeed, the threshold requirement of a combination or conspiracy could somehow be met in such a case.) The short answer to this theory is that Ohio introduced evidence that a desire to stop Ohio from intrabrand competition was the true reason for Sealy's acquistions, *e.g.*, that influential neighboring licensees complained, that Sealy paid a price it considered too high for Florida, and that it persisted in acquiring licensees Ohio sought to buy despite the fact Sealy could not operate them profitably. The choice between the conflicting evidence and the differing inferences was for the jury, not for the district court in considering Sealy's motion for judgment n.o.v., and not for us in reading a cold record on appeal.

Sealy advances one additional argument on the issue of a market allocation violation that we believe deserves brief attention. Although Sealy agreed to the district court's *per se* allocation, it argues now that the Rule of Reason was the only possible basis of its liability and that Ohio did not satisfy the rule. Sealy says that its acquiescence in the *per se* instruction does not bar this argument because it does not seek reversal on the basis of improper instructions, *see* Fed. R. Civ. P. 51, but rather asserts that under the law truly and properly applicable to the case Ohio's case should never have been submitted to the jury. It

12. Sealy's position derived some evidentiary support from proof that Sealy explored the possibilities of vertical integration with two different business consulting firms, and that Sealy and a number of its licensees entered a valuation program conducted by one of the consulting firms to appraise the licensees' businesses. Ohio took the position that the program, with its corollary restriction that no participating licensee could sell its business during the course of the valuations, was at least in part a move to limit intrabrand competition by removing licensees from the acquisitions market in which Ohio was interested.

insists that this is particularly true where the law has changed after the trial, because an appellate court is bound to render decision on the issues before it on the basis of currently applicable law. As Sealy's argument derives from *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra,* decided after final judgment was rendered below, we agree that the argument should be considered, *see Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711 (1974), but we reject it on the merits.

*Sylvania* overruled *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), and held, as had the *White Motor* case, *supra,* decided only four years before *Schwinn,* that *vertically-imposed* territorial limitations must be judged not by a *per se* rule but by the Rule of Reason. Because the Court in *Sylvania* expressly reaffirmed the appropriateness of the *per se* rule for horizontal territorial limits, 433 U.S. at 58, n.28, it is difficult to see how the decision advances Sealy's argument.[13] It insists nonetheless that the very premise of the *Sylvania* decision is that restrictions on intrabrand competition may promote interbrand competition, thus making it impossible to say that such restraints have the requisite "manifestly anticompetitive" nature to justify a *per se* rule of illegality. *Id.* at 50; and *see Northern Pacific Railway* v. *United States,* 356 U.S. 1, 5 (1958). In *United States* v. *Topco Associates, Inc., supra,* however, the Court rejected exactly this argument in the context of horizontal restraints, 405 U.S. at 610-11, and the *Sylvania* decision expressly reaffirmed that rejection. 433 U.S. at 57 n.27. A horizontal agreement among potential competitors to develop a national brand and not tò compete with each other in selling it is, we think, considerably more suspect than limitations imposed

13. We are aware of no authority interpreting *Sylvania* as having any pertinence to horizontal restraints such as those at bar. *Newberry* v. *Washington Post Company,* 438 F.Supp. 470, 474, n.5 (D.D.C. 1977); *Evanston Motor Company, Inc.* v. *Mid-Southern Toyota Distributors, Inc.,* 436 F.Supp. 1370, 1372-73 (N.D. Ill. 1977); and *Pitchford Scientific Instruments Corporation* v. *Pepi, Inc.,* 435 F.Supp. 685, 688 (W.D. Pa. 1977), all recognize the lack of such pertinence, and Sealy has not suggested that there are any cases to the contrary.



by a single independent manufacturer on its distributors as a condition of their distributorships, but even if we were inclined to agree with Sealy's arguments to the contrary, we believe the Supreme Court has foreclosed that approach. Moreover, had we accepted Sealy's argument that only the Rule of Reason could be applied, we would be unable to agree that Ohio failed to make out a jury case under that rule. Dr. Mueller testified, *e.g.,* that the national mattress industry was heavily concentrated and the market was heavily conditioned to acceptance of major brand names, and that, accordingly, an increase in intrabrand competition—in this industry at least—would also promote increased interbrand competition.

We now turn to Sealy's contentions that Ohio demonstrated no antitrust injury and no antitrust damages compensable under Section 4 of the Clayton Act, 15 U.S.C. § 15. Section 4 provides treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." After final judgment herein, the Supreme Court decided *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), an important case in the interpretation of Section 4, and one on which Sealy heavily relies.

In *Brunswick,* a large national producer of bowling equipment had acquired numerous bowling alleys that had defaulted in their debts to the producer. It was conceded before the Court that the acquisitions violated Section 7 of the Clayton Act, 15 U.S.C. § 18, in that they might substantially lessen competition or tend to create a monopoly, and that but for the acquisitions, the alleys would have failed. Plaintiffs were operators of bowling alleys competing with those acquired by Brunswick, which established that they would have gained larger market shares and profits had Brunswick not acquired its alleys and kept them in business. The Court held that plaintiffs were foreclosed as a matter of law from recovering the profits thus lost, despite the causal link between the lost profits and the antitrust violation. More was required, specifically a nexus between the recovery

sought and the purposes of the antitrust laws. In *Brunswick*, a Section 7 violation existed only because a "deep pocket" giant was entering a market of "pygmies." 429 U.S. at 487. Yet if the failing alleys had acquired refinancing or been purchased by "shallow pocket" firms, plaintiffs would have suffered the same loss, despite the absence of a Section 7 violation. Similarly, if the alleys had been prosperous, Brunswick's acquisition would have been at least as illegal, yet plaintiffs would have suffered no loss. *Id.* As the Court pointed out, plaintiffs were really seeking damages for loss caused by fair competition, in total perversion of the purposes of the antitrust laws.[14] As the Court summarized the teachings of its *Brunswick* decision:

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

*Id.* at 489 (emphasis in original). Sealy argues here that Ohio totally fails to meet that standard.

At the outset, we note that Sealy's argument goes too far. To justify judgment n.o.v. even with respect to the market allocation theory to which the *Brunswick* argument is addressed, Sealy would have to demonstrate that absolutely no antitrust injury was evidenced at trial. That cannot be said here. To take but one example, the jury was entitled to find that pass-over payments and product service repair charges were parts of a plan of market allocation, and Ohio introduced evidence of nearly $170,000 paid to Sealy thereunder. We do not believe an argument can be made that a tax on intrabrand competition is not the type of injury the antitrust laws were intended to prevent or that it does not flow from that which makes a market allocation scheme illegal. Nonetheless, if Sealy is correct that Ohio's lost profit damages resulting from Sealy's acquisition of the Florida,

14. The Court emphasized that a very different case would have been presented had plaintiffs shown that Brunswick had abused its deep pocket by engaging in, *e.g.*, predatory conduct injuring plaintiffs, but plaintiffs made out no such case.



Pittsburgh, and Philadelphia licensees are not compensation for antitrust injury, a new trial would be required because the amount of damages awarded by the jury established as a mathematical certainty that compensation for those lost profits was a part of the jury's verdict.[15]

The thrust of Sealy's argument is that the competitive situation would have been the same regardless of whether the prior licensee, Ohio, or Sealy had primary responsibility for the territories in question.[16] It insists that Ohio is merely a disappointed desirous purchaser of the licensees, and that to award damages for the disappointment is a perversion of the antitrust laws. If Ohio had claimed damages here on the theory that, *e.g.*, Sealy's acquisitions in themselves violated Section 7 of the Clayton Act, Sealy's argument might have some plausibility. Sealy ignores, however, the theory Ohio argued to the jury and on which the district court gave instructions, that Sealy's exercise of its right of first refusal was a part of a scheme of market allocation, done to keep Ohio from establishing new bases from which it might effectively compete with neighboring licensees.

15. As we have noted, Ohio claimed a total of $9,233,563 in damages, of which $6,436,995 represented profits lost by the lost acquisitions. The jury's verdict awarded $6,814,852.

16. Sealy hypothesizes that if an outside buyer had simply outbid Ohio in its attempts to acquire the licensees, there would have been the same loss to Ohio without any antitrust violation. This argument has the appeal of superficial similarity to an example used by the Court in *Brunswick*. *See* discussion *supra*. But the point the Court was making there—that there was no nexus between the injury claimed and the purposes of the antitrust laws—simply cannot be made here, for reasons discussed *infra*. The incorrectness of lifting the example from the *Brunswick* opinion and attempting to generalize it without regard to its context can be quickly demonstrated by an example: if General Motors, on its own and for bona fide and unassailable business reasons, chose to stop supplying one of its dealers with automobiles, there would be no antitrust violation, yet the loss to the dealer would be identical to that which would result if all the neighboring dealers had pressured GM to cease supply in order to reduce intrabrand competition. We doubt that even Sealy would argue that the loss in the latter instance would not be antitrust injury. *See United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).

Evidence indicated that had Ohio acquired the territories, its policy of competing across the borders of its APR's would have produced significant intrabrand competition that did not occur under Sealy's management of the territories. Moreover, there was evidence that within the APR's themselves, Sealy would have been a more efficient producer and more effective interbrand competitor. While Sealy would not presumably have blocked Ohio's attempted acquisitions for the purpose of limiting effective inside-APR interbrand competition, evidence indicated that a loss of that competition may have been a price Sealy was willing to pay to achieve the primary purpose of maintaining territorial restraint.

There was, in other words, evidence of an illegal scheme to divide markets, intentionally effectuated against Ohio by means of Sealy's acquisitions, resulting in harms both to intrabrand and interbrand competition because Ohio's contracts to acquire the licensees were frustrated.[17] We believe the profits lost thereby do reflect injury of a type the antitrust laws were intended to prevent and do flow directly from the anticompetitive scheme that made Sealy acquisitions illegal. Obviously, to the

17. Sealy advances the related argument that Ohio's losses were not caused by the right of first refusal or its exercise, but merely by Ohio's decision not to make higher bids than Sealy was willing to match. We wholly disagree. The jury was properly instructed that it would be sufficient to establish causation if the jury found antitrust violations to be material factors in causing loss. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). We note that there was no evidence indicating that Ohio had the power to force a licensee desirous of selling his business to withdraw the business from sale to Sealy once the right of first refusal was exercised. Indeed, the thrust of Sealy's counterclaim, rejected by the jury, was that Ohio committed grievous wrong by the role it may have played in even *encouraging* selling licensees to withdraw their business from sale at the time of Sealy's attempted exercise of the right. Moreover, in both Florida and Philadelphia, Ohio did up the ante significantly, only to have Sealy (which had not expressed previous interest in acquiring either licensee) match the higher offer, even though at least in the case of Florida, Sealy considered the price paid too high. The jury could surely have found that the market allocation scheme was in fact the cause of Sealy's exercise of the right of first refusal.



degree the profits Ohio would have made might include profits that a poor interbrand competitor committed to avoiding intrabrand competition could also have made,[18] they do not totally reflect an actual harm to market competition. But as the Court made clear in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curriam), private antitrust suits need not be premised on actual diminutions in market competition, so long as they involve anticompetitive conduct aimed at the plaintiff. The refinement made in *Brunswick* is simply that the injury claimed "should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S., at 125." 429 U.S. at 489 (footnote omitted). That test is amply met here.

B. Tying and Price-Fixing of Mattress Components

It is undisputed that Sealy required its licensees to manufacture Sealy products in accordance with certain specifications. The specifications required use in mattress foundations of a torsion bar element called a Posturegrid, which is a patented product of the Universal Wire Spring Company. Sealy also insisted that certain other specified components be purchased from designated approved suppliers. Mattress springs are the component primarily in issue here. Sealy had three subsidiaries that manufactured spring units and that were at all pertinent times

18. We emphasize that it is by no means clear that the profits Ohio would have made in the territories would not have been entirely attributable to increased intrabrand and interbrand competition. Sealy, after all, a demonstrably less effective interbrand competitor which, perhaps understandably, made no significant intrabrand sales in the territories, *lost money* on the territories acquired to block Ohio's expansion. We note here, in passing, that Sealy does not attack the method used by Ohio to estimate its lost profits, applying a representative Ohio-plant profit margin to the sales actually made in the territories after Sealy acquired them. *Cf. Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra* at 116-17.

approved suppliers.[19] Evidence established without dispute that Universal Wire and approved spring manufacturers paid to Sealy a charge of from three to five percent of their sales to the licensees, unbeknownst to the licensees. The jury could have found that the charge was in the nature of a payment for the privilege of being a supplier to Sealy licensees, akin to a commission to Sealy for purchases it forced its licensees to make.[20] There was also evidence that prices for Posturegrid assemblies and spring units under this system were significantly higher than for comparable products available in the market. Sealy's chairman, indeed, admitted that something of a "captive market" existed for spring units for Sealy products. Ohio also introduced evidence that during the late 1960's, Sealy's original spring manufacturing subsidiary (in Rensselaer, Indiana) argeed with the only other manufacturer then approved to supply Sealy licensees that the two firms would set the same prices.

We agree with Ohio and the district court that it was proper to send Ohio's components claims to the jury. "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. at 5. Because they deny competitive access to the tied product market on the

19. Sealy Spring Corporation—Indiana was the only subsidiary in existence throughout the entire damage period, but Sealy Spring Corporation—East and Sealy Spring Corporation—West were approved suppliers from their inception through the end of the period.

20. Sealy's Vice President at one time wrote a letter to the President of an approved spring supplier, referring to the charge as a royalty for the privilege of supplying Sealy licensees. Although Sealy's trial witnesses attempted to characterize the charge as compensation to Sealy for its quality control inspection program for suppliers, officials of Sealy had prior to 1971 frequently referred to the charge as a royalty, a commission, or a load charge. Sealy also had at one time, extending into the damage period pertinent to this case, received rebates on mattress ticking supplied to licensees, such rebates being justified only by a desire for revenues for Sealy. Sealy does not argue on appeal that the jury was obliged to accept the quality control service charge characterization.



basis of the seller's leverage in the typing product market, and force buyers to forego free choice between sellers, such arrangements

> are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of commerce is affected.

*Id.* at 6 (citations omitted); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 498-99 (1969).

Sealy, as we have said, does not dispute that it conditions the license of its trademarks on the licensee's use of specified components from designated suppliers. Nor does it deny that its unique and legally protected trademarks, *see United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 619, 621 (1977), which have achieved substantial consumer acceptance, create sufficient power to allow it to restrain competition in the market for the components, or that a substantial volume of commerce is affected.[21] Sealy does argue, nonetheless that the challenged practices are not of the type properly condemned as tying arrangements.

With reference to the Posturegrid specification, Sealy points out that the Universal product was patented and argues that it was the legal patent monopoly that foreclosed competitors' access to Sealy licensees. This assertion unfortunately misses the thrust of Ohio's claim, that Sealy wrongfully mandated use of the Posturegrid and gained hidden rebates thereby, at the expense of the licensees.[22] We quite agree with Ohio that a patented product, like any other, may be illegally tied. "The anti-

21. Ohio's purchases alone of the allegedly tied components amounted to approximately $9.6 million during the pertinent period, and the entire Sealy organization obviously purchased many times this amount.

22. Ohio introduced evidence that it would have purchased comparable items elsewhere (given the premium price Universal was charging) but for the mandatory specification.

trust laws do not permit a compounding of the statutorily conferred monopoly." *United States* v. *Loew's, Inc.*, 371 U.S. 38, 52 (1962).

Sealy also insists that the vice condemned in the tying cases simply cannot be found where a trademark licensor specifies the patented products of a third company for use by its licensees, because the licensor, whatever the power conferred by his trademark's value, cannot be said to be using it to invade a second market. We agree that there is no illegal tying arrangement where a "tying" company has absolutely no financial interest in the sales of a third company whose products are favored by the tie-in. *Crawford Transport Company* v. *Chrysler Corporation*, 388 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U.S. 594 (1965); *Keener* v. *Sizzler Family Steak Houses*, 1977-2 Trade Cases ¶ 61,682 at 72,800 (N.D. Tex. 1977); *Rodrigue* v. *Chrysler Corporation*, 421 F.Supp. 903 (E.D. La. 1976). Here, however, it is undisputed that Sealy received substantial rebates from Universal on sales to the licensees, and, moreover, that those rebates were concealed from the licensees. The concealment aspect alone might have justified a jury's decision to disbelieve Sealy's claim that the payments made to Sealy were not in return for the specification of Universal's product as mandatory Sealy components. In addition, the asserted justification for the payments was that they were compensation for Sealy's technical efforts in helping Universal adapt its torsion bar concept to the mattress industry. Yet Sealy's President admitted that Universal had prior to dealing with Sealy applied the concept to the mattress industry (though an improvement was still needed at the time), and, as was brought out at trial, the written agreement between Sealy and Universal made no reference to Sealy's provision of technical assistance, though it did state that Universal was to provide technical assistance to Sealy. Sealy's third argument on the Posturegrid units, that the specification was not shown to be other than a bona fide decision on the basis of product merit by a trademark owner to protect the essential



characteristics of the trademarked product, may be disposed of briefly. The jury could have found from the evidence we have discussed that Sealy forced the use of the Posturegrid and was paid handsomely by Universal simply for creating a captive market in which it could and did charge a premium price. Even if the Posturegrid was a superior product, such an arrangement was unlawful. *See Osborn* v. *Sinclair Refining Co.*, 886 F.2d 232 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), a case very similar to this one.

Regarding mattress spring units, Sealy takes the position that an essential element of a tying case is proof of actual foreclosure of competition. It cites *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 523 F.2d 961, 967 (6th Cir. 1975), *rev'd, United States Steel Corp.* v. *Fortner Enterprises, Inc., supra; Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); and *Driskill* v. *Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974), to support this proposition, and says that Ohio has failed to introduce the requisite proof. Because the Supreme Court has repeatedly held that tying, if it fits within the *Northern Pacific* standard, is a *per se* violation, we are not free to inquire whether such tying in any given case injures market competition. Sealy's argument, however, is somewhat more subtle than that, and we agree that if a given tying arrangement has no potential to foreclose access to the tied product market, it does not exemplify the vice that led the Court to declare tying a *per se* offense. *Coniglio* and *Driskill* amply ilustrate the proper bounds of the actual foreclosure rule.[23] In these cases, the practices of two National Football League clubs of requiring season ticket buyers to purchase preseason exhibition game tickets in the same package were attacked as illegal tie-ins. Because both clubs had a complete monopoly, however, in the tied as well as the tying market, *there could be no foreclosure* of competitive access to the tied

23. The Sixth Circuit's *Fortner* opinion cited *Coniglio and Driskill* as recognizing an actual foreclosure requirement, but declined to apply it as a bar to the case before it.

market resulting from the tie-in. If the same thing could be said here, Sealy would have been entitled to a directed verdict on mattress spring tying.[24]

We think there was clearly a jury question on foreclosure during the pertinent period, however. Only approved manufacturers could supply Sealy licensees. Sealy's own subsidiaries were always approved. Prior to 1972 (when Sealy obtained patents on the then-specified spring units) only two other firms were approved, the Steadley Company from which Ohio purchased and a west coast firm referred to as Laisco. Both firms paid, as the jury could have found, a commission to Sealy for the privilege of supplying Sealy licensees. *See Osborn, supra.* The Steadley Company was induced to agree to base its prices for specified units on those charged by Sealy's manufacturing subsidiary.[25] The jury was entitled to infer that no firm which would not play the game by these rules would win Sealy's approval as a supplier. In this context, Sealy's statement that there was no evidence it ever denied supplier approval carries much less weight than might otherwise be the case. Moreover, the jury could have concluded Sealy attempted to force Steadley and Laisco out of the suppliers' market. In 1970, Sealy developed new specifications which it thought patentable, and applied for a patent thereon. Although Sealy now cites its licensing of a supplier

24. Because the jury may have awarded some damages flowing from the tie-in, Sealy, under *Coniglio* and *Driskill*, would be entitled either to a new trial, or to a remittitur of the full amount of damages claimed from tying to eliminate the possibility it was prejudiced by submitting the claim to the jury. *See Durant* v. *Surety Homes Corporation*, No. 77-2045 (7th Cir. August 8, 1978). The possibility also exists that the district court's remittitur of half of the jury verdict, if erroneously offered as an alternative to a new trial, would render harmless the submission of the tying theory to the jury. *See* discussion *infra*.

25. Sealy's attack on the sufficiency of the evidence to prove this point is without merit. Evidence indicated not only identity of actual prices charged but also an express agreement to fix prices. That Sealy's officials denied the agreement, or that Ohio could not prove the agreement continued to any definite ending date, would not have justified taking the question from the jury.



under the patent, after it issued in 1972, as evidence of its magnanimity and of lack of foreclosure, Sealy advised both Steadley and Laisco in 1970 that if a patent issued no one would be licensed thereunder. Thus even if Steadley withdrew from supplying Sealy springs in late 1970 because of a lack of desire to incur tooling costs that would not be recoverable over a reasonable amortization period if the patent issued, the jury could have concluded that Sealy used the no-license threat to drive Steadley out of the market during the interim period. (When Steadley did withdraw, only Sealy's subsidiary was left in the captor selling market created by the specifications.) Furthermore, Steadley asked for the specifications for the new system so that it could tool up to produce the new springs, or at least consider doing so, and Sealy refused to provide them. Thus it is not even clear Steadley would not have been willing to be a supplier in the interim period. There was also evidence to support the conclusion that Sealy used its quality control inspection and approval powers to force Steadley out of the market. Sealy's President at one point in 1970 wrote to its Vice President suggesting that Sealy ought to consider continuing to allow Steadley to manufacture approved products (despite alleged quality control problems) as a bargaining tool to avoid problems from Steadley regarding the proposed change of specifications that would put Steadley out of the business of supplying Sealy licensees.[26]

C. The National Accounts Agreement

To deal with potential customers such as Montgomery Ward & Co., Sears, Roebuck & Co., and J.C. Penney Co., which sell bedding at many retail outlets throughout the country, Sealy

26. Sealy's attack on the sufficiency of the evidence to make a jury question of Ohio's theory of monopolization of Posturepedic springs is based entirely on the no-foreclosure argument which we have just rejected. Accordingly, we reject the argument in this context as well.

developed its national accounts program,[27] which was originally embodied in a separate agreement but which is now a part of Sealy's license agreements. Under this program, Sealy approached the national accounts directly and attempted to negotiate agreement to supply both Sealy-brand products and private label products according to agreed specifications and at agreed prices. Once agreement was reached, each Sealy licensee was given the opportunity to participate in the program for the particular national account involved. Participation, we emphasize, was wholly voluntary. Any licensee was free not to participate, and to negotiate directly with the customer in an attempt to supply all or any part of the customer's needs. (Sealy has not had exclusive dealing contracts with any national account.) Even though a licensee might originally elect to participate, it was perfectly at liberty at any time to withdraw from the program and to begin negotiations with the customer.[28] While a licensee was in the program, however, it was obliged to supply the customer's outlets in its APR with the specified products at the agreed price. The customer was not prevented from specifying that it wanted deliveries to any given outlet made by a licensee which did not have primary responsibility for the territory in which the outlet was located. This in fact did occur from time to time.

Sealy's primary national account was Montgomery Ward & Co. (Ward's). The furniture merchandise manager for Ward's testified that his company had committed itself to a policy of purchasing from firms that could serve Ward's needs nationally, because of the efficiency, simplicity, and flexibility available in dealing with a single source of supply.[29] He also testified that if

27. It is a matter of some historical irony, if no great substantive significance, that the program was devised by a committee chaired by E.M. Wuliger, the President of Ohio.

28. The sole limitation on the right to withdraw was that a licensee was obliged to fill orders under the program for a six month transition period. No claim is made that this provision is illegal.

29. Ohio repeatedly emphasizes that Ward's does not in fact deal with a single supplier of mattresses. It is true that Ward's has

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Sealy eliminated the national accounts program, Ward's would turn to other national suppliers to meet its needs and would not return to its earlier "chaotic" practice of purchasing from many manufacturers. This testimony was undisputed. Sealy officials testified that the existence of such attitudes among national account cutsomers was the reason for the program Ohio attacks, and this testimony also was never seriously challenged.

Ohio participated in the national accounts program until 1974, at which time it withdrew. Since that time, Ohio has vigorously sought to capture a significant part of Ward's business, offering lower prices than those provided by the Sealy-Ward's contract. As we have noted, Ohio is an efficient high quality manufacturer. Nonetheless, Ohio has not been successful in garnering Ward's business, because of Ward's preference for dealing with a national supplier. Asserting the illegality of the national accounts program, Ohio sought $106,766 in damages for sales it alleged it would have made to Ward's (and to J.C. Penney, in a much smaller amount) but for the program.[30]

We have concluded that the district court should have directed a verdict in Sealy's favor on this claim. First, as Sealy points out, the profits lost from sales to Ward's resulted from Ohio's purely voluntary choice to compete for the business on its own, not from any illegality that arguably might have infected the national

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separate national suppliers of foam and innerspring mattresses, and that in a few isolated instances Ward's is obliged by circumstances to meet its needs locally. There is even one market area where Ward's agreed, in response to appeals from community leaders, to purchase mattresses from a local firm as part of a program to shore up the depressed economy in the market area. The essential fact, however, stands undisputed in the record: Ward's does have a policy of buying from a single source of supply, albeit that policy is subject to rare exceptions.

30. Ohio also claimed $294,915 in damages for royalties paid to Sealy for goods not bearing Sealy-brand labels. Over 97% of these royalties derived from sales to Ward's while Ohio was in the national accounts program, but the rationale for these damages is analytically distinct and we consider this claim hereinafter.

accounts program. Both causation and *Brunswick, supra,* problems pose insurmountable obstacles to the recovery sought.

Second, and more fundamentally, we are unable to perceive how a jury could have found the national accounts program to be illegal. It is clear that a joint selling agency is not *per se* violative of the antitrust laws. In *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933), the Supreme Court applied the Rule of Reason to, and ultimately approved, an arrangement by which 12% of the coal suppliers in a given region sold all their coal to all buyers through a joint agent. The Court did so notwithstanding a finding, which it did not overturn, that prices for coal would rise as a result of the arrangement, because the economic circumstances extant made the arrangement reasonable, and demonstrated that real competition would continue to exist in the market. The case before us would appear to follow *a fortiori* from *Appalachian Coals.* Here the joint sales agreement applies only to a limited type of customer, no licensee is foreclosed from competing for the business independently, and there is absolutely no basis in the record for assuming that a powerful national purchaser like Ward's is foolishly suffering a higher price from the program than it could at any time obtain from other national suppliers that no doubt would be pleased to have the business. Sealy's success with Ward's, in fact, appears to reflect an increase in interbrand competition with no diminution of intrabrand competition, because Sealy licensees could not have competed effectively for the business without combining to offer a single source of supply. In *2361 State Corporation* v. *Sealy, Inc.,* 402 F.2d 370, 374, (7th Cir. 1968), this court had occasion to consider Sealy's national accounts program. We indicated at that time that the Rule of Reason ought to be applied to the program, but held that Sealy had not met the strict requirements to justify summary judgment under the rule. *See Poller* v. *Columbia Broadcasting System, Inc., supra,* 368 U.S. at 473. Ohio has had its day in court to attack the program—it has had, in fact, four months in court—but it has failed to demonstrate the anticompetitive vice inhering in it.



It will not do to lump the program indiscriminately in with the proven elements of Ohio's territorial allocation case, as Ohio invites us to do. Although most sales are assigned to licensees on the basis of APR's, this is not invariably the case, and, more importantly, no licensee is restrained *by the program* from competing in any territory for the business of national account customers. Nor does Ohio's assertion that it has proved a resale price maintenance agreement between Sealy and Ward's advance its argument. If such an agreement were found, the antitrust laws would surely provide a remedy, by way of trebled damages caused thereby (which Ohio did not claim to suffer) or an injunction, sought by one injured by the agreement (which Ohio did not claim to have been) or the United States. But the existence of the *agreement,* which we assume *arguendo,* really says nothing about the reasonableness of the *program,* which is a separate practice in a separate market.

Ohio also claimed damages of nearly $300,000 in royalties paid to Sealy on Ohio's sales of non-Sealy label goods. The license agreement called for royalties on such sales (in lower amount, naturally, than for Sealy products), and Ohio attacks this provision of the agreement. Because nearly all the sales in question were made to Ward's, the parties treat this claim as part of the national accounts element of Ohio's case, but the rationale of liability is quite distinct: Ohio says that to require the payment of royalties on products not sold under Sealy's trademark is a *per se* violation of the antitrust laws, citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 135-36. *Zenith,* however, does not stand for the propositions for which Ohio's claim requires its support. First, the Court did find patent misuse in that case, but it expressly stated that

> it does not necessarily follow that the misuse embodies the ingredients of a violation of either § 1 or § 2 of the Sherman Act . . . .

*Id.* at 140. Second, the misuse involved was the *conditioning* of a patent license on the licensee's agreement to pay royalties on products both using and not using the teachings of the patent. The Court expressly reaffirmed the rule of *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950), that a patent owner could negotiate for royalties on total sales (whether or not all sales used the patent) as a convenient measure of the value of the license. It was simply the refusal to license on any other terms that constituted the misuse, and the Court pointed out that no inference of such conditioning could properly be made simply because a license provision called for royalties on total sales. 395 U.S. at 138.

Even if the leverage allegedly used by Sealy to obtain non-Sealy product royalties were the bare grant of the right to use a patented product, Ohio's claim would fail for the lack of a showing of conditioning. Although the letter accompanying Sealy's post-*United States* v. *Sealy* decree proposed license agreement indicated that the failure to accept the agreement would lead to license termination, extensive negotiations were in fact had over agreement provisions, and Ohio was able to obtain revisions in the proposed agreement. There was no evidence that Ohio sought to eliminate the non-Sealy royalties, which no doubt would have resulted in a higher royalty on the Sealy-brand products. Moreover, Sealy obtained royalties not merely for the bare license of its trademark, but also for significant advertising, technical, and other services. To argue that none of the services provided in the package could have benefited the licensed plants other than in the production and sale of Sealy-brand products is to far outrun the facts in the record. It is significant, also, to recall that over 97% of the royalties Ohio paid were for sales to Ward's. Without the organizational and management services of Sealy, and the specifications developed between Ward's and Sealy, such sales would never have been made, as Ohio's experience since withdrawing from the national accounts program so amply demonstrates.



Our analysis in this section of the opinion leads to the conclusion that the jury was permitted to consider awarding $401,681 in damages for practices of Sealy that did not violate the antitrust laws. That error obviously does not entitle Sealy to a judgment n.o.v. on all of Ohio's case. Because we cannot know that the jury did not award the full amount claimed on these theories, that amount would have to be deducted from the amount of the verdict to insure the lack of prejudice to Sealy. The consequences of our conclusion here on the judgment appealed cannot be determined, however, just yet. In Section II of this opinion, we consider the attacks made on the district court's decision to condition the denial of Sealy's new trial motion on a 50% remittitur. If the district court was right, an additional remittitur offer of $401,681 (trebled) would cure the error we have found. If Sealy is right that prejudicial errors existed that remittitur could not cure, our remarks on national accounts and non-Sealy royalties will become only guidance for the future conduct of the litigation. And if there did not exist prejudicial errors sufficient to mandate new trial or justify the remittitur, then the accepted remittitur would render totally harmless the submission of these theories to the jury.

## II. *Prejudicial Misconduct, Remittitur, and New Trial*

As we have stated, the district court denied Sealy's motion for a new trial conditionally on Ohio's accepting a 50% remittitur, which it did. The court rejected Sealy's claims that references to *Sealy Mattress Co. of Southern California* v. *Sealy, Inc., supra*, 346 F.Supp. 353,[31] and *United States* v. *Sealy, supra*,[32] created

31. The district court judge decided that a danger existed that the jury might have realized that the cited case, *see* n.7 *supra*, was tried by him and resolved adversely to Sealy. The court concluded, however, that the error, if it existed, was harmless. We think it doubtful from our review of the record that the jury would have made the connection between the California licensee's case and the presiding judge here, or that it would have inferred that the court had found Sealy at that time to be violating the antitrust laws (the

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improper prejudice, but ruled that trial misconduct by Ohio's counsel had led the jury to award excessive damages for which the remittitur was suggested as a cure. Sealy argues here that the court's findings of trial misconduct amounting to prejudice required the court to grant a new trial, because the prejudice could not be said to have been confined to the damage award. Ohio denies that there was prejudicial misconduct, but insists that the district court acted properly to cure it if there was.

We must confess to having some difficulty understanding how prejudicial misconduct could be said with certainty to have affected the jury's decision only as to damages. *See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520, 521-22 (1931). We do not decide the question here, however, because we have reached the conclusion that the district court

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case involved only the licensee's claim that its license contract was not nullified by the *United States* v. *Sealy* decree) even if it had realized the identity of the judge deciding the case. We do agree, however, that any error involved was harmless. Sealy does not attack this conclusion.

32. Sealy argues that *United States* v. *Sealy* should have been kept out of the trial and that at least an exhibit pertinent thereto that was sent to the jury room mandated a new trial. We agree with Sealy and the district court that *Sealy* could not form the basis of a collateral estoppel on liability herein, but think it clear from the facts of this case that *Sealy* was very much a relevant and proper part of the background of this litigation. The exhibit in issue here contained Judge Austin's findings and conclusions in *Sealy* both before and after the Supreme Court opinion, and a short precis (approved by the district court herein) of the latter opinion. We agree with the district court and the parties that it would have been better if the jury had not been given Judge Austin's opinions. (These were apparently left in the exhibit transmitted to the jury accidentally.) We are unable, however, to find any real possibility of prejudice resulting from the transmittal. The exhibit was one of *many* exhibits sent to the jury. The fact that Sealy had engaged in market allocation was properly known to the jury without the exhibit, and the jury was correctly instructed that if it found Sealy to have continued the practice, it should find a *per se* violation. As to Judge Austin's findings that Sealy had also engaged in illegal resale price maintenance, we agree that those facts were of little if any relevance to this case, but Sealy's own witness, on direct examination, had testified to the prior practice and its illegality.



committed clear error in ruling that prejudicial misconduct existed. As we have indicated, Ohio denied the existence of prejudicial misconduct in its brief, although its primary contention on this issue was that the district court's resolution of any problem that may have existed was adequate. At oral argument, Ohio renewed its denial of prejudice, asking that this court, if it should be inclined to accept Sealy's challenge to the cure of remittitur, satisfy itself that the district court was correct in finding prejudice. Any hesitancy we might have had in addressing an issue not fully discussed in the briefs on appeal is more than alleviated by the voluminous post-trial briefs filed in the district court, which we have considered along with the record in the case.

We think it clear that Ohio is entitled to make this argument, despite Sealy's protestations. It is quite true that a plaintiff who accepts a remittitur may not appeal from the district court order proposing it as an alternative to a new trial. *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977). The *Donovan* principle also forecloses Ohio from seeking reinstatement of the 50% remitted now that Sealy attacks the remittitur on appeal. As this court held in the recent case of *Durant* v. *Surety Homes Corporation*, No. 77-2045 (7th Cir. August 8, 1978), slip op. at 5, however:

> On the other hand, a prevailing party may quite properly defend his judgment on any ground supported by the record. *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970). For the limited purpose of defending the remitted judgment they have accepted, we believe the Durants are entitled to argue that the district court erred in conditioning the denial of Surety's new trial motion on the acceptance of a remittitur.

Sealy's post-trial motion listed no less than 86 instances of alleged prejudicial misconduct by Ohio's trial counsel. We have no intention of further extending the length of this opinion by repeating the list and setting the context of each incident. A general summary will suffice. At various times, counsel stated that Sealy was attempting to get favorable testimony before the

jury while precluding Ohio from developing the whole story pertinent thereto, referring, *e.g.*, to the California licensee's lawsuit referred to above, notes 7 & 31, which was true even though scarcely graciously put. Counsel frequently disparaged Sealy's witness by insinuations in questions, or by stating in response to objections, that the witnesses were unresponsive, that they "remembered" details much better when Sealy's counsel sought testimony from them than when the witnesses were pressed on cross- or adverse examination, that various business reasons for Sealy practices put forward by its witnesses were not true reasons, that a witness lacked knowledge of the subject matter of his testimony, and that witnesses were testifying inconsistently. One of the most extreme instances of this type of conduct occurred in response to an objection to counsel's taking so long to cross-examine a Sealy witness, when counsel replied, "It is a lot harder to crack a phony story, than to tell it in the first place, Judge." Counsel also made numerous statements along the lines that Sealy's counsel was engaged in improperly "testifying" in his role as counsel, was improperly arguing to the jury during the taking of testimony, and had made repeated factual errors. Other comments were made between counsel (and definitely not just by Ohio's counsel) that can only be characterized as either harmless badinage or occasionally angry exclamations of no particular consequence, a number of which appear on Sealy's list. Counsel also engaged in several argumentative ejaculations that clearly ought not to have been made, two of the most serious of which were "Let's ask the price fixer the question" and "If the Sealy organization is in favor of it, it is most probably illegal."

We have carefully examined the pertinent portions of the record, and can sum up part of our reactions by saying that some of the items on Sealy's laundry list were quite arguably unobjectionable, others were objectionable, if at all, only on the basis of their tone, and others were no doubt improper behavior. The decision as to whether those items which were improper



produced prejudice denying Sealy a fair trial, however, cannot be made without examining the general context of the trial to determine the possible impact. *See* 6A MOORE'S FEDERAL PRACTICE ¶ 59.05[3] at 59-54 (1974).

This was a long jury trial of a complex antitrust case. While the challenges and subtleties of antitrust law often hold a strong fascination for lawyers, a trial such as this one could hardly be expected to keep the average lay juror on the edge of his or her seat for twelve weeks. Recognizing this, in fact, the district court and the attorneys for the parties engaged in a running facetious colloquy throughout the trial, the point of which was that jurors might tend to doze off as a trial day wore on, and that by three o'clock some sparks set flying by counsel could be just the thing to regain the jury's full attention. The court often would advise counsel after a verbal skirmish over some objection or other that "we needed that." The court repeatedly expressed its view, informed by observation of the jury, that the jurors seemed to like both lead counsel and their different styles, that the attorneys had done a fine job of livening up a potentially deadening case, that the jury would be able to sort out the evidence from the personalities when they deliberated, and that the court could perceive no real possibilities of prejudice to either party. This is not to say that the court refused to intervene when it perceived counsel approaching the line of possible prejudice. Numerous objections were properly sustained, and the jury was repeatedly admonished that the exchanges of the lawyers were not evidence and were not to be considered in deciding the case. *Compare New York Central Railroad Company* v. *Johnson*, 279 U.S. 310, 318 (1929); *with Koufakis* v. *Carvel*, 425 F.2d 892, 901, 903 (2d Cir. 1970), on which Sealy heavily relied in its post-trial briefs in the district court. We surely would not bind Sealy thereby, but it is interesting to note that at a point in the trial when nearly half of the cited seriously prejudicial incidents had occurred, Sealy's lead counsel told the court:

> I will say this, your Honor, and it may prejudice me if I should ever find myself in a position where I have to appeal

> here, but I will say it nevertheless. I think you have done a great job of giving the parties just as fair a trial as a judge could ever do.

It also is worth pointing out that although it would not be fair to characterize all (or nearly all) of Ohio's counsel's alleged misconduct as responsive to arguable improprieties by Sealy's counsel, numerous instances can be so described, *see Stanczak* v. *Pennsylvania R. Co.*, 174 F.2d 43, 48 (7th Cir. 1949), and it can certainly be said that Sealy's counsel strayed from the straight and narrow on more than a few occasions. Counsel for both sides definitely contributed to keeping the jury awake.

At one point relatively late in the trial, the court commended the attorneys as follows:

> The Court: Gentlemen, I am real proud of you. You are doing so much better than I expected. I approached this case with great fear and concern.
>
> Mr. Hastings: You thought there were going to be fisticuffs?
>
> The Court: Yes, yes.

In the month of trial that followed, involving nearly 2400 pages of transcript, only seven additional incidents occurred which Sealy even bothered to include in its list of 86 prejudicial occurrences. All were minor in nature.

While we do not condone conduct by counsel not designed to advance his case by properly established procedures, we are also not unmindful that in the heat of advocacy, conduct and words which are exchanged and which when viewed on the cold record appear to be on the unseemly side may very well not be so regarded that way at all by the jury, particularly when they occur in the give and take of a hotly contested and extended lawsuit. "Juries are not so likely to get excited or inflamed by lawyers' talk as lawyers think they are." *Smith* v. *Philadelphia Transp. Co.*, 173 F.2d 721, 726 (3d Cir. 1949). If the jury were to be prejudiced by such activity it would be just as likely that it would be directed toward the offender. Ultimately we



think the common sense of a jury will prevail in most instances and we are not concerned on the present record that that is not the situation.

When the jury returned its $6.8 million verdict, the district court queried the attorneys whether he had discretion not to treble the damage award. The court was advised that Congress had left no discretion on that point, and, as the court later stated in arguments on post-trial motions, it was very surprised at that result. During those arguments, Sealy's counsel told the court that a judgment in excess of $20 million would wipe out Sealy's net worth and require giving the whole business to Ohio. These factors clearly influenced the court. As it stated in its ruling on the new trial motion:

> The size of the jury's verdict was shocking. At the time it was returned I considered it shocking and asked "How did it happen[?]"

After reflection on Sealy's 86 instances of alleged misconduct, the court decided that those instances must have produced prejudice in the jury room, notwithstanding that, as we have noted, the court had consistently throughout the trial, in the context in which the instances occurred and with the benefit of observation of the jury, expressed its view that no prejudice had been created.

We have concluded that the district court erred in the decisional result of the search on which it embarked for causative error. In the first place, we cannot read the court's decision as an exercise of its discretion to weigh the evidence and to find a damage award not fairly supported thereby, for beyond passing comments that some of the damages claimed tended to the speculative, the court engaged in no weighing of the evidence. Indeed, the court's shock at the size of the full judgment appears to have derived as much from its recognition that trebling was mandatory as from any concern that the facts did not support the award. There was in fact competent evidence that could

have supported a verdict substantially higher than that returned. That the jury returned an award lower in amount that the evidence, if believed, could warrant may itself be an indication of a lack of jury passion and prejudice. *See Stanczak, supra* at 48; *Cf. Koufakis, supra* at 901; *Missouri-K.-T. R. Co. of Texas* v. *Ridgway*, 191 F.2d 363, 368-69 (8th Cir. 1951). Moreover, it was plainly the jury's task to decide whether or to what degree to believe Ohio's damages evidence. It was properly instructed on proximate cause, and that it should only award damages capable of reasonable ascertainment and must not speculate or guess. We note in this regard that Sealy's attacks on Ohio's damages evidence during the trial may fairly be described as mild, and it did not even go into the issue on final argument. Recognizing that "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra*, 395 U.S. at 123, we think the Court's conclusion in *Eastman Kodak Company of New York* v. *Southern Photo Materials Company*, 273 U.S. 359, 379 (1927), applies equally here:

> [P]laintiff's evidence as to the amount of damages . . . was competent; . . . it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed . . . that the amount of the damages could not be detemined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And *the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive*. [Emphasis added.]

*Accord, Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Fontana Aviation, Inc.* v. *Beech Aircraft Corporation, supra*, 432 F.2d at 1085-86. Accordingly, we are of the opinion that the district court was mistaken in taking the size



of the jury's award as a demonstration that there must have been prejudice created somewhere.

Also, as we have suggested, we have reached the firm conviction that the court erred in finding that there was in fact such prejudice. It should go without saying that we are reluctant to overturn the finding of the district court on such a matter, as we do not have the benefit of having observed the trial and felt its pulse. On the other hand, the considerable deference usually to be accorded to a district court's evaluation of the effect of misconduct is necessarily reduced in this case, where the court, while observing the trial and perceiving its tone, consistently stated in definite terms its confidence that no prejudice was extant, and only a year later, in ruling on post-trial motions, did the court reverse its view. It is axiomatic that litigation parties are entitled only to a fair trial, not to a perfect one. Our thorough and independent review of the record has convinced us that the district court was right the first time, that it did a commendable job of ensuring that the parties received a fair trial, and that it committed error in applying hindsight to a trial that was by no means perfect but that was free from prejudical error.

Accordingly, in view of the fact that the jury verdict was unnecessarily halved, Sealy was, to say the least, not prejudiced by the district court's disposition of its new trial motion.[33] The remitted damage judgment in Ohio's favor is affirmed.

### III. *The District Court's Denial of Equitable Relief*

After disposing of the post-trial motions, the district court took additional evidence in hearings on equitable relief and ultimately decided, notwithstanding the jury's determination that Sealy had violated the antitrust laws, that Ohio was entitled to no equitable relief whatsoever. The legal principles

33. It follows from our conclusion here that submitting the national accounts program and non-Sealy royalty damages to the jury was only harmless error.

applicable to Ohio's appeal from that denial are straightforward and undisputed. Relief under Section 16 of the Clayton Act, U.S.C. § 26, "invokes traditional principles of equity . . ." *Zenith Radio Corp.* v. *Hazeltine Research, Inc., supra,* 395 U.S. at 130. Accordingly, a district court might properly find violations of the Sherman Act and yet upon application of the traditional equity principles determine that injunctive relief was not appropriate. On the other hand, injunctive relief under Section 16 is

> characteristically available even though the plaintiff has not yet suffered actual injury, . . . ; he need only demonstrate significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

*Id.*

Where both legal and equitable relief are sought by a plaintiff, the Seventh Amendment right to a jury trial requires that the legal claims be tried first, to a jury. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959). This court's decision in *Florists' Nationwide Telephone Delivery Network* v. *Florists' Telegraph Delivery Association,* 371 F.2d 263, 270-71 (7th Cir.), *cert. denied,* 387 U.S. 909 (1967), provides a useful summary of the implications of a jury's antitrust verdict for a district court's subsequent ruling on equitable relief. Any actual issues necessarily and actually decided by the jury are foreclosed under settled principles of collateral estoppel from subsequent reconsideration by the district court. The court may not make findings "contrary to or inconsistent with the jury's resolution . . . of that same issue as implicitly reflected in its general verdict . . . on the damages claim." *Id.* at 271.

In this case, the jury returned a general verdict, and we agree with Sealy that given the complexity of the issues before the jury, the verdict by itself and out of the context of the trial could not necessarily be said to have foreclosed any particular issue. *See Russell* v. *Place,* 94 U.S. 606, 608-09 (1877); 1B MOORE'S



FEDERAL PRACTICE ¶ 0.443[4] (1974). The amount of the verdict, however, makes it a mathematical certainty that the jury found at least one of Sealy's first-refusal acquisitions, discussed *supra,* to have violated the antitrust laws. The jury was instructed that it could not find the use of a right of first refusal to constitute a violation unless it also found that the right was used as part of an unlawful scheme. The only unlawful scheme of which the acquisitions could have been part was, as Ohio maintained at trial, market allocation. The court's instructions, indeed, discussed the acquisitions as part of the instructions on allocation. We think the court erred, thus, in premising its equitable relief decision on the assumption that the only fact established by the jury verdict was that at least one acquisition somehow violated the antitrust laws. Under the evidence and the instructions, and as the case was argued, the jury verdict must also be read to include a finding that Sealy was engaged in a scheme of market allocation in which one or more acquisitions were at least a part.

The district court should have approached the requested equitable relief in the light of this established fact, but it did not do so. We think the court should have another opportunity to consider equitable relief on market allocation in this light, and with the benefit of the law applicable to this case as we have discussed it in part I of this opinion. We do not mean to say by any means that the court must find any particular practice attacked by Ohio to violate the antitrust laws. It should consider the evidence adduced both at the jury trial and at the equitable relief hearing, and will be free to make findings not inconsistent with the jury verdict. If the court should find, however, that practices we have said might properly be found to be components of an illegal market allocation scheme were not such, it should explain its analysis in greater detail than it no doubt thought necessary to do in rendering decision on the assumption that the existence of market allocation was open to question. The court should also bear in mind that once a violation is

established, as at least one is here, the court may properly enjoin the defendant from "other related unlawful acts." *Zenith, supra* at 133. This practice serves the public interest by "effectively pry[ing] open to competition a market that has been closed by defendant's illegal restraints." *Id.*[34]

With reference to Ohio's mattress components claims, we agree with the district court that the jury's verdict does not necessarily establish a violation here. We do believe the court should reconsider its decision as to past components violations in the light of part I-B of this opinion, and should explain its reasons for finding no past violations, if it should continue to adhere to that view. Sealy argues on appeal that evidence introduced at the equity hearing established that Sealy has modified its practices so as to eliminate all possibility of injury to licensees like Ohio. The district court on remand will, of course, be free to find that this is true, but it has not yet done so and it is not for us to make findings based, ultimately, on the credibility of witnesses we have never seen.

On remand the district court may, of course, take any additional evidence or argument it might find helpful. Circuit Rule 18 will not apply, however. We have full confidence that the district court judge will approach the equitable relief problems afresh, with the benefit of the views expressed herein, and that the interests of efficient judicial administration will unquestionably be well served by leaving the case with the judge who has already become expert in its many intricacies.

34. We express no view on the propriety of Ohio's request that the court order Sealy to divest the acquired licensees to Ohio, other than to say that the court should consider this issue along with all others in deciding what total mix of equitable relief, if any, might be just in the circumstances, and to state that such relief would not be foreclosed simply by Ohio's having received damages for past lost profits on this theory. Obviously, in any event Ohio would not be allowed to receive the licensees without payment therefor.



IV. *Post-Judgment Interest*

On April 3, 1975, judgment on the jury's general verdict was filed with the Clerk of the District Court and entered in the civil docket. The prompt entry of the judgment rendered it effective under Rule 58, Fed. R. Civ. P., and comported with that rule's mandatory language that "upon a general verdict of a jury, . . . the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court . . . ." In fact, entry of the judgment followed a brief proceeding before the district court in which Sealy's counsel agreed with counsel for Ohio that prompt entry was "automatic."

Under 28 U.S.C. § 1961,

> [i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

To avoid the interest accruing on the $10,222,278 to which Ohio had agreed to remit its judgment, Sealy thereafter argued to the district court, successfully, that Ohio should be awarded interest only from the date of the final judgment in which the court denied equitable relief and wrapped up the case, January 18, 1977. The court ordered, accordingly, that Ohio was to be deprived of interest on its entered damages judgment during the more than twenty months preceding the court's resolution of remaining issues in the case. We disagree.

To begin with, the language of Rule 58 read with § 1961 seems perfectly clear. Judgment is to be entered promptly, and interest runs from the date of entry. To persuade us that this language does not mean what it says, Sealy advances two arguments, neither of which, in our opinion, has merit.

First, it says that prior to January 18, 1977, absent an order of court pursuant to Rule 54(b), Fed. R. Civ. P., there could be no final judgment on which interest could run. The initial

difficulty with this argument is that § 1961 does not in terms require that a judgment be final in the sense of tying up all the issues in a case. Congress knew how to specify finality when it was intended, *see* 28 U.S.C. § 2411, and it did not do so here. Moreover, the cases cited by Sealy do not support its position. In *Caputo* v. *U.S. Lines Company*, 311 F.2d 413 (2d Cir.), *cert. denied sub nom. Imparato Stevedoring Corp.* v. *United States Lines Co.*, 374 U.S. 833 (1963); and *Howell* v. *Sinclair Refining Company*, 20 F.R.D. 623 (N.D. Ala. 1957), the courts did indeed deny interest on judgments entered by the respective clerks, on the basis that the judgment entries had been made prematurely. But both cases fell squarely within Rule 54(b), which governs judgment: "[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim . . . ." In such cases, the court may expressly direct the entry of judgment as to less than all of the claims upon an express finding that there is no just cause for delay. Until and unless the court does so, as the courts in *Caputo* and *Howell* emphasized, the clerk has no authority to enter judgment, for Rule 58 is expressly made subject to the provisions of Rule 54(b). Both courts recognized that if the 54(b) direction had been made, thus rendering the entry of judgments proper, interest would have run from the date of entry. Here, in contrast, we do not have the separate claims that call Rule 54(b) into play, but merely one claim for two types of relief. Nothing in the district court's decision on equitable relief could have had any bearing on Ohio's valid judgment for damages, and it would make no sense to adopt the rule that the interest to which Ohio is entitled by law on its judgment properly entered under Rule 58 had to be forfeited if Ohio desired to press its request for equitable relief.

Sealy's second argument is that when motions for a new trial and for judgment notwithstanding a jury verdict are filed in a



case, judgment on the verdict may not properly be entered until those motions are disposed of.[35] Sealy cites *Murphy* v. *Lehigh Valley R. Co.*, 158 F.2d 481, 485 (2d Cir. 1946); and *Christian* v. *Southern Railway Company*, 151 F.Supp. 192 (E.D.S.C. 1957) (following *Murphy*), which do support the proposition advanced, but with which we are constrained respectfully to disagree. We note initially that there is definite authority the other way. *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 F.2d 847, 848-49 (5th Cir. 1944); *Litwinowicz* v. *Weyerhaeuser Steamship Company*, 185 F.Supp. 692 (E.D. Pa. 1960); 6A MOORE'S FEDERAL PRACTICE ¶ 58.04[2] at 58—124-26 (1974). The latter authorities seem to us clearly more in keeping with the meaning of the Federal Rules of Civil Procedure. Rule 58, as we have said, calls on district court clerks to enter judgment on general jury verdicts promptly without even waiting for directions from the presiding judge, let alone waiting to see whether the losing defendant will file post-trial motions. In fact, Rules 50(b) and 59(b), (e) define the timely filing of such motions as being not later than ten days after "entry of the judgment," the very act Sealy would have us hold cannot properly occur if post-trial motions are filed. Plainly Rule 59 and Rule 50 contemplate that judgment will be entered promptly without regard to whether post-trial motions are in the offing. So does Rule 62(b), which gives the district courts discretion to stay the execution of judgments pending disposition of post-trial motions.

Because of Rule 62, there can be no prejudice to a defendant if interest runs, as 28 U.S.C. § 1961 provides, from the entry of judgment. If post-trial motions are successful, or if defendant gains judgment or a new trial on appeal, it will be forced to pay

35. This argument would theoretically deny Ohio interest only until May 27, 1976, when Ohio filed its remittitur, except that no renewed judgment was entered at that time or, indeed, until January 18, 1977. Because we reject the assertion that judgment was improperly entered on April 3, 1975, we need not decide whether, if the assertion were accurate, Ohio could legitimately seek interest for the period between May 27, 1976 and January 18, 1977.

no interest. Where, as here, the motions are unsuccessful or successful only to the extent of reducing the amount of the judgment, the defendant will pay only that interest to which the plaintiff is lawfully entitled. Ohio should receive the lawful rate of interest on its remitted judgment from the date of entry, April 3, 1975.

For the reasons stated herein, the final judgment herein is affirmed insofar as it awards Ohio $10,222,278 in damages, and reversed insofar as it denies all equitable relief and the right to interest from April 3, 1975 on the remitted damage judgment, and the case is remanded for further proceedings consistent herewith.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*



Judgment of the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 11, 1978

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. LEONARD P. MOORE, *Senior Circuit Judge**

HON. WILBUR F. PELL, JR., *Circuit Judge*

| | |
|---|---|
| OHIO-SEALY MATTRESS MANUFACTURING COMPANY, et al., *Plaintiffs-Appellants, Cross-Appellees,* | Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. |
| *vs.* | |
| Nos. 77-1239, 77-1240 | No. 71-C-1234 |
| SEALY, INC., et al., *Defendants-Appellees, Cross-Appellants.* | James R. Parsons, Judge. |

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinoi. Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be, and the same is hereby, AFFIRMED, with costs, insofar as it awards Ohio $10,222,278 in damages; and REVERSED insofar as it denies all equitable relief and the right to interest from April 3, 1975 on the remitted damage judgment; and the cause is REMANDED, in accordance with the opinion of this court filed this date.

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

## APPENDIX B.

### JUDGMENT OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 71 C 1243

Ohio-Sealy Mattress Manufacturing Co., et al.

v.

Sealy, Inc., et al.

Chief Judge James B. Parsons, Presiding

Judgment dated January 18, 1977

It is Ordered and Adjudged that the Plaintiffs, Ohio-Sealy Mattress Manufacturing Company, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, and Sealy Mattress Company of Georgia, recover of the Defendants, Sealy, Incorporated, Sealy Spring Corporation—Indiana, Sealy Spring Corporation—East, Sealy Spring Corporation—West, Sealy Mattress Company of Colorado, Inc., Sealy Mattress Company of Northern California, Inc., Sealy Mattress Company of Southern California, Inc., Schnorr Manufacturing Company, Inc., Sealy Mattress Company of Florida, Inc., Sealy Mattress Company of Pittsburgh, Inc., and Sealy Mattress Company of Philadelphia, Inc., the sum of $10,222,-278, being three times the amount of the verdict (following Remittitur) pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, with interest thereon at the rate of six percent from January 18, 1977.

It is further Ordered and Adjudged that the counter-plaintiff Sealy, Incorporated, taking nothing and that the Third Amended Counterclaim be dismissed.

It is further Ordered and Adjudged that said plaintiffs have and recover of said defendants their costs of suit, including attorneys' fees, if any, in an amount to be hereafter determined upon a hearing by the Court. The time limitation of General Rule 45 of this Court shall not apply.

It is further Ordered and Adjudged that this Court's Order of September 2, 1976 providing for security in lieu of supersedeas shall stand as to security in lieu of supersedeas pursuant to Rule 62(d) of the Federal Rules of Civil Procedure and execution upon the judgment shall be stayed in accordance therewith.

For the reasons stated of record, plaintiffs' requests for equitable relief are denied.

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## MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 71 C 1243

OHIO-SEALY MATTRESS MANUFACTURING CO., ET AL.

v.

SEALY, INC., ET AL.

Chief Judge James B. Parsons, Presiding

Dated January 25, 1977.

Generally, in a case such as this the final orders of the Court are incorporated in a formal and published opinion. It is a case that has occupied much of the time of the lawyers in it for a number of years. The many briefs they have filed in it reflect the excellence of their command of the field of antitrust law, and ought themselves be bound in a single volume that would serve well as a text book in this highly specialized area of the law.

My review of the authorities on the issues involved in this concluding decision, however, has caused me to approach this task in another manner. I am convinced that the law involved is uncertain and difficult to marshal and that a published opinion by me may well not serve the best interests of the state of the law. For that reason, I have determined to discuss rather informally with the parties, over the bench and on the record, my determinations and the reasons for them. A more formal recitation of them, however, shall be separately typed and filed in the case.

That, I believe, will satisfy the requirements of Rule 52, Federal Rules of Civil Procedure.

When in an action at law damages are awarded for an injury for all harm—past, present, and future visited or to be

visited upon the complainant as a result of that injury—equity will not enter to exercise its powers unless, the circumstances justify the conclusion that without its intervention the same injury will occur again. It is not enough if the contemplated future injury is of a similar nature or will occur between the same parties or between parties similarly situated. The criterion is that the injury that will occur again must be the same injury between the same parties; and the occurring again must be a reoccurring, and not otherwise a continuation of the effect of the original injury. Of course, if the transaction we label an injury is itself a continuing on-going transaction, as differing from the on-going effect of the injury sued upon, it is enjoinable.

Equity does not enjoin the future commission of a wrong where there is no basis upon which to determine that the wrong will be committed, and the fact that one has committed a wrong in the past and has the capability of committing it in the future will not serve to be such a basis. Thus equity will not enjoin the commission of a crime, even though the one to be enjoined has committed the crime before and has the capacity to commit it again. For each crime there is a legal remedy sufficient unto itself. So for each civil wrong, where there is a civil remedy, equity may not be used today to preclude the use of the civil remedy tomorrow. It is where the civil remedy for tomorrow's wrong is inadequate or no longer exists that equity will come to the aid of him who will be wronged tomorrow.

When plaintiffs commenced this antitrust action, they asked for both money damages and equitable relief, and they have persisted in their demand for both types of relief throughout the case. After a trial on the issues, a six-person jury rendered a verdict for the plaintiffs and against the defendants in an amount which when tripled by operation of law measured in round figures almost twenty and one-half million dollars. In lieu of a new trial, plaintiffs accepted a remittitur of 50%. I now have completed an evidentiary hearing and extensive arguments on the question of equitable relief, and finally must answer whether



under the circumstances of this case plaintiffs are entitled to any equitable relief, and if so, to what extent and in what manner must defendants be enjoined.

The complaint alleged that defendants violated Sections 1 and 2 of the Sherman Act by virtue of and by conduct growing out of defendants' pursuit of various provisions of a licensing agreement between defendant and its licensees, of whom plaintiff was one. For example, defendants exercised a contractual right of first refusal, and as a result, acquired three of its licensees which plaintiffs had wanted and had sought to acquire. Defendant required its licensees to purchase certain specific component parts to be used by them in their manufacture of Sealy mattresses. These parts were available only from specified manufacturers or companies owned in whole or in part by defendants. These are just two of the numerous matters of which plaintiffs complained.

When the case went to the jury, the jury was given forms for a general verdict only. Thus, without its being able to inform the parties and the Court of what specific acts of the defendants it considered to have been in violation of law, the jury was permitted to find liability based on any one or more of several theories of wrongdoing, i.e., market allocation, group boycott, price fixing, and tying.

There was the theory that this conduct involved *per se* violations of law, to which, if established to the satisfaction of the jury, there could be no defense.

Then there was the theory that the exercise of the contractual right of first refusal called into play the Rule of Reason test for liability, and that the evidence was sufficient for the jury to find that the defendants did not act in good faith in any of the acquisitions.

These theories were given the jury in the alternative with authority to apply the applicable test as to each of the claimed violations.

A monopolization instruction also was given the jury, and I then instructed the jury of the eight categories into which the plaintiffs' claims fell.

It was against this backdrop of multiple theories and claims of liability that the jury was permitted to determine a general verdict. Plaintiffs acquiesced in this general verdict. No demand was made for special verdicts, for special findings, or for answers to specific interrogatories.

It is worth repeating that the most difficult task in looking to the question of equitable relief is coordinating specific injunctive orders, if these are to be such orders, with the jury's verdict; for equitable relief must not "do violence" to the jury's verdict. Rather, it must be consistent with the verdict. *Florists Nationwide Telegraph Delivery Network* v. *Florists Telegraph Delivery Associations,* 371 F. 2d 263, 271 (7th Cir. 1967), *cert. denied,* 389 U. S. 909.

If the injury found by the jury is of a continuing nature, or may be found from the greater weight of the evidence to be an injury that will in the same manner occur again in the future, very definitely, whatever it is, it must be enjoined.

Specifically, plaintiffs request three kinds of equitable relief. (1) They seek to stop the defendants henceforth from maintaining the various provisions of the licensing agreement, almost all of which plaintiffs claim by virtue of the general verdict to have been found to have been illegal. (2) They seek to have me restrain defendants from buying component parts for the Sealy products from suppliers approved by or owned by the defendants. And (3) they seek of me an order of divestiture to cause the defendants to turn over to the plaintiffs the Florida, Pittsburg, and Philadelphia licensees.

The question here is whether the plaintiffs are entitled to any type of equitable relief under the circumstances of this case, and, if so, what should be its nature and extent. But this question is preempted by a preliminary question, i.e., can a general verdict,



under the circumstances of this case, be the basis for the equitable relief requested. The plaintiffs urge that all disputed issues of fact are deemed to have been decided in favor of the recipients of a general verdict. They cite *Wong* v. *Swier,* 267 F. 2d 749, 757 (9th Cir. 1959); *Bank of America National Trust and Savings Association* v. *Hayden,* 23 F. 2d 599, 602 (9th Cir. 1956). Incidentally, while these cases recite the proper test rule for sustaining a verdict attacked on appeal, they do not address themselves to the equity problem of this case. Cf. *Security Insurance Company of New Haven* v. *Johnson,* 276 F. 2d 182, 188-9, (10th Cir. 1960).

Logic and fundamental fairness dictate that a general verdict in a multiple issue case cannot be construed as a finding of illegality with respect to each and every allegation of wrongdoing found in the complaint, and neither statutory provision authorizes nor compelling public interest dictates such a finding as a matter of law. This conclusion is even more inescapable where the instructions of the law given the jury include alternative theories for testing liability.

Consistent with my observation of August 13, 1976, the verdict in this case can be deemed neither to have established that any one of the specific contractual provisions in and of itself was illegal, nor to have determined that any particular combination of them constituted illegality under the Act. In the same vein, I find that the general verdict cannot, for the purposes of my decision here, be deemed to have determined that any one or combination of the practices of the plaintiffs constituted price-fixing, or constituted group boycott, or constituted tying, or market allocation.

The most that can be surmised from the verdict is to be found not from the form of the verdict, but from the amount of damages. It is a strong supposition—not determination. It is that the jury found some liability with respect to the acquisition by the defendants of the Florida, Pittsburgh, and Philadelphia licensees. However, it cannot be determined from the verdict

and the amount of damages whether it was the existence of the right of first refusal clause in the contract, or the manner in which in one or more of these acquisitions the contract clause was exercised that was in violation of the Act.

We must recognize that even if civil liability in an antitrust action is clearly established, whether or not in the exercise of sound discretion the Court should grant a request for equitable relief must be predicated upon the traditional principles of equity, as they apply to the antitrust laws, including a threatening future injury, the convenience and effectiveness of court administration of the relief, and a balancing of the public's interest with the private needs of the complainant. *Zenith* v. *Hazeltine*, 395 U.S. 100, 130-131 (1968); *Bray* v. *Safeway Stores, Inc.*, 395 F. Supp. 351, 867-868, (N.D. Cal. 1975).

The evidentiary hearing on equitable relief has as its primary function the investigation of these fundamental equitable considerations. In this case, such investigation should assist the Court in making equitable determinations about the licensing agreement itself, the continuing or future practices of the plaintiffs with relation to such matters as component parts, the determinations to be made regarding the location of plants, passover payments, warranty charges, national accounts, and, of course, the future acquisitions by the defendants of other licensees, as well as the future operation by the defendants of the Florida, Pittsburgh, and Philadelphia licensees.

Plaintiffs' request that I enjoin defendants from enforcing the provisions of the licensing agreement relative to plant location, exclusive manufacturing territories, the provision restricting the manufacture of non-Sealy label mattresses, the right of first refusal, passover payments, warranty repair charges, royalties on non-Sealy products, and national accounts.

Considering both the jury verdict on the evidence presented in the case before the jury and the evidence presented in the hearing on equitable relief, I am unable to find either future illegality in the pursuit by the defendants of any one of these



provisions, or illegality in the future pursuit of any combination of them.

Each of these several provisions of the licensing agreement, I find from the facts before me for this determination, is a legitimate and accepted business practice, used extensively through the business community, important to the promotion of inter-brand competition. I find from the evidence that may be considered in this phase of the case, that the nature of the mattress industry dictates the priority of inter-brand competition over intra-brand competition from the perspective of the public interest, and that with relation thereto the needs of the plaintiffs are not unduly threatened in the future by pursuit by the defendants of the provisions of the licensing agreement, except such combined pursuit of them or certain of them as a part of a deliberate scheme and design to frustrate the plaintiffs' opportunity to engage in intra-brand competition, in such manner as must have been found by the jury to have been followed in the case they decided. The judicial administration of a general injunction, if any were dictated under these circumstances, would be impracticable, unmanageable, and for the purpose of saving for the plaintiffs the cost and time of a future litigation for damages, it would be totally unwarranted. I am unable to find from the verdict of the jury and the evidentiary hearing on equitable relief, facts supporting plaintiffs' position to the effect that the continued pursuit of these contractual provisions, or any combination of them, absent an intentional purpose to completely deprive plaintiffs of the opportunity to compete, will result in irreparable injury to plaintiffs. If, in fact, Sealy, Inc., were to use these contractual provisions for the clear purpose of visiting injury upon plaintiffs, plaintiffs' remedy at law, i.e., damages, would be more adequate than would be a general injunction or a series of specific injunctions. Since neither the jury verdict nor the hearing on equitable relief has established the unlawfulness of the contractual provisions, an attempt at injunctive relief would be a serious error.

My position on this matter is further strengthened by the very nature of this action. Significantly, it is a suit on behalf of a private party and not on behalf of the general public. As stated before, the public interest will not be served by this court's re-writing the licensing agreement and reorganizing the defendants' structure. In addition to the inappropriateness of a general injunction and the unavailability of a series of specific injunctions, is the fact that the general public, which includes plaintiffs, has the benefit of an injunction against the defendants that is still viable. That injunction is in the earlier case in this district of *United States* v. *Sealy*, 60 C 844.

By their second form of requested equitable relief, plaintiffs would have me enjoin defendants from continuing certain practices whereby defendant has required its licensees to purchase component parts from approved suppliers. My findings with relation to the contractual provisions relate equally to component parts.

Plaintiffs ask for divestiture in the matter of the acquisitions. But here the unascertainable nature of the basis for the jury's verdict leaves the Court without a guide as to which of the acquisitions need be set aside and to what extent. Plaintiffs say that this remedy constitutes restitution and is called for to rectify and prevent unjust enrichment.

Initially, I observe that there is a considerable question of whether or not this court or any other court is empowered to order divestiture in a private antitrust suit under Section 16 of the Clayton Act. See e.g., *International Telephone and Telegraph Corporation* v. *General Telephone and Electronics Corporation*, 518 F. 2d 913 (9th Cir. 1975); *Calnetics Corporation v. Volkswagen of America, Inc.*, 532 F. 2d 674 (9th Cir. 1976), *cert. denied*, 45 U. S. Law Week 3345 (Nov. 8, 1976); but cf. *N.B.O. Industries Treadway Companies, Inc.* v. *Brunswick Corporation*, 523 F. 2d 262 (3rd Cir. 1975).

Even assuming arguendo that divestiture would be proper under Section 16 of the Clayton Act, it is such a drastic remedy



that it need not necessarily be applied where other remedies will provide sufficient relief to the plaintiffs. *N.B.O. Industries, supra.* Plaintiffs have been fully compensated by the jury verdict for any harm they have suffered as a result of the acts complained of in the pleadings herein. The statutory trebling of damages carries the inference that the full size of the injury is to be compensated for in money damages.

Ironically, were I to grant plaintiffs request for divestiture, plaintiffs, not defendants, would be unjustly enriched. Plaintiffs would be awarded both the assets it sought to purchase and the damages assessed by the jury.

Moreover, restitution is not available under Section 16 of the Clayton Act for the harm that may have been experienced when it already has been compensated for by damages given under Section 4 of the Sherman Act. See e.g., *In re Multidistrict Vehicle Air Pollution;* 538 F. 2d 231, 234 (9th Cir. 1976).

In view of all the forgoing, I am denying each of the requests of plaintiffs for equitable relief in this case. And it is so ordered. Wherefore, I am entering of record the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Plaintiffs are Ohio-Sealy Mattress Manufacturing Company, and four of its wholly-owned subsidiaries, Sealy Mattress Company of Houston, Sealy Mattress Company of Puerto Rico, Inc., Sealy of the Northeast, and Sealy Mattress Company of Georgia. Each plaintiff is a licensee of defendant Sealy, Incorporated, and each is engaged in the manufacture and marketing of mattresses and boxsprings.

2. Defendant, Sealy, Incorporated, is a Delaware corporation engaged in the business of licensing mattress manufacturers to manufacture and sell mattresses, boxsprings and related bedding products under Sealy's trade names and marks. It has three wholly-owned subsidiaries engaged in the business of manufac-

turing and selling innerspring units and six wholly-owned subsidiaries and one subsidiary engaged in the business of manufacturing and selling mattresses, boxsprings and related bedding products.

3. The plaintiffs' complaint alleged numerous violations of the antitrust laws based on various provisions in the defendants' license agreement with its licensees, on the exercise by defendants of a so-called right of first refusal to acquire three of its licensees, and on certain practices of defendant with respect to components purchased by plaintiffs for use in the manufacture of mattresses. The complaint sought both damages and equitable relief.

The Jury Verdict

4. After an eighteen-week trial, the case was submitted to a six person jury under instructions that permitted the jury to hold defendants liable on the basis of any of a number of different theories of violation of the antitrust laws and with respect to any of a number of different categories of claimed damages.

5. The theories of liability submitted to the jury included market allocation, group boycott, price-fixing, and tying, all as possible *per se* violations of the antitrust laws; the use of a right of first refusal as part of an unlawful scheme; the foregoing grounds of liability considered alternatively as possible unreasonable restraints of trade rather than *per se* violations; and monopolization.

6. With respect to six specific provisions of the defendants' license agreement, the jury was charged that such provisions were not in and of themselves unlawful but that they would be unlawful if used in such a way as to achieve or maintain an arrangement which limits or restricts in any substantial way the geographic areas in which products may be sold. Under the instructions the jury could have determined (1) that one or more of those license provisions, or some combination of them had been used in such a way as to constitute a *per se* violation; or (2) that one or more of such license provisions, or some combination of them had been used in such a way as to constitute an unreasonable restraint of trade; or (3) that none of them had been used in such a way as to constitute either a *per se* violation or an unreasonable restraint.



7. The instructions did not require the jury, in order to hold defendant liable, to conclude that the license provisions or any one or any combination of them had been used in such a way as to constitute a violation of the antitrust laws.

8. The jury was instructed that plaintiffs' damage claims fell into eight different categories. The summary of damage claims presented by the plaintiffs to the jury included approximately twenty different items. The jury was not instructed that it was required to award damages with respect to any category or item of claimed damages if it did so with respect to any other category or item. It was not instructed that it must base liability on any particular theory of violation in order to award damages on any particular category or item of claimed damages.

9. The case was submitted to the jury with instructions to return a general verdict and without any request for special findings or answers to interrogatories.

10. The jury returned a general verdict in favor of plaintiffs on the complaint and awarded plaintiffs damages in the amount of $6,814,852. On motion of the defendant for Judgment Notwithstanding the Verdict or for New Trial, the Court on May 19, 1976, ordered the granting of a new trial unless the plaintiffs consented to a remittitur in the amount of 50% of the verdict. The plaintiffs filed its acceptance of the remittitur on May 27, 1976.

11. Plaintiffs' total damage claims as submitted to the jury amounted to $9,233,563.

12. There is no combination of items of damage as submitted by plaintiffs which equals the amount of damages as awarded by the jury.

13. The largest items of damages claimed by plaintiffs were those respecting the acquisition claims. Those claims totalled approximately $6.9 million. The amount awarded by the jury could not logically have been arrived at without including some portion of those acquisition claims. It need not have included all of those claims.

14. It is not possible to determine from the jury verdict what violation or violations of the antitrust laws were necessarily determined by the jury in arriving at its verdict. The most that can be determined is that the jury must have believed that there was some liability in connection with the defendant's acquisition of one or more of the three licensees. Assuming such a violation was determined, it is not possible to ascertain on what theory of liability such a violation was determined or whether such a violation affected one, two, or three of the acquisitions. It is not possible to ascertain from the jury verdict that the jury determined any violation with respect to any of the specific provisions of defendant's license agreement or any combination of them. It is not possible to ascertain from the verdict that the jury determined any violation with respect to the components part of plaintiffs' case.

### The Hearing on Equitable Relief

15. After the Court's ruling on the motions for Judgment Notwithstanding the Verdict or for New Trial, plaintiffs filed proposed findings and a proposed decree granting equitable relief, and in connection therewith requested an evidentiary hearing for the purpose of adducing additional evidence bearing on equitable relief. Defendant opposed the granting of equitable relief and filed proposed findings in support of its position. The Court directed that an evidentiary hearing be held and such a hearing was held, covering nine trial days.

16. At the outset of the hearing on equitable relief, plaintiffs' counsel stated that he accepted for purposes of equitable relief the court's ruling that the jury verdict could not be taken as having established any violations of the antitrust laws with respect to the provisions of the license agreement or the components claims. Plaintiffs' counsel further stated that for purposes of the requested equitable relief he would assume that the challenged license provisions and practices with respect to components were violations of the antitrust laws as a matter of law. In effect, plaintiffs proposed to rely on the position they had asserted in their motion for summary judgment made in advance of the trial to the jury, which motion the Court had denied.



17. With respect to the acquisitions portion of the case, plaintiffs' counsel stated that for purposes of equitable relief he would assume that violations of the antitrust laws had been determined by the jury verdict.

18. The evidence adduced at the evidentiary hearing on equitable relief consisted generally of evidence as to the present license provisions and practices of the defendant, evidence as to the present conditions of competition in the industry, especially with reference to intra-brand competition among the Sealy licensees, and expert testimony as to the probable effect on the parties and on the public interest of each of the various kinds of equitable relief requested by the plaintiff.

### The License Agreement

19. Plaintiffs have requested the elimination from the license contract of seven provisions, dealing respectively with (a) exclusive manufacturing territories; (b) plant location; (c) passover payments and warranty-repair charges; (d) ownership of competing brands; (e) royalties on products not bearing Sealy labels; (f) the so-called right of first refusal; (g) National Accounts.

20. For the reasons previously noted the verdict cannot be deemed to have determined that any of the foregoing license provisions constitutes a violation of the antitrust laws, or that all of them together constitute a violation of the antitrust laws, or

that any combination of them constitutes a violation of the antitrust laws.

21. I am unable to find that there has been established any past violation of the antitrust laws which could be the basis for injunctive relief with respect to these license provisions.

22. For similar reasons, I am unable to find in these license provisions any threatened future violation of the antitrust laws which could be the basis for injunctive relief.

23. I find on the basis of the evidence presented to the jury and the additional evidence presented to me in the evidentiary hearing on equitable relief that each of the license provisions in question is, a reasonable and appropriate means of protecting the legitimate interests of the defendant as a trademark owner in promoting the exploitation of the Sealy trademarks through its licensees. I further find that the public interest would not be promoted by enjoining the defendant from using any or all of such contractual provisions in its business, and that such an injunction could, by weakening the effectiveness of the defendant as a competitive force in the mattress market, have adverse effects upon the public's interest in vigorous competition.

24. Passover payments are a method of dealing with the "free rider" problem. They do not constitute a prohibitive or significant barrier to inter-area sales. The royalty structure under the Sealy license is a significant incentive to any licensee to sell additional units inside and outside its area of primary responsibility. The "Product Service Repair Charge" on sales of Sealy label mattresses and boxsprings shipped outside a licensee's area of primary responsibility insures that Sealy licensees will stand behind the Sealy Warranty and that a defective mattress or boxspring will be repaired under the Sealy Warranty outside that licensee's area of primary responsibility.

25. Paragraph IV:9 of Sealy's 1968 license agreement, limiting a licensee's interest in a competitive bedding company to 5%, serves to prevent conflicts of interest or divided loyalties



with the licensee. The paragraph was amended in 1972 expressly to permit a licensee to engage in a competitive mattress business anywhere in or out of its area of primary responsibility through a subsidiary using a brand name or private label owned by the subsidiary or its customers. There are ordinary business reasons for such a restriction from an economic viewpoint.

26. A royalty on non-Sealy label products encourages a licensee to exploit the Sealy label. Under the license agreement, Ohio-Sealy can manufacture private label products in a non-Sealy plant and not be subject to paying any royalties to Sealy.

27. Sealy's national accounts program is a means of enabling Sealy licensees to compete for the business of large purchasers who prefer to buy from a single source. It increases the number of competitors who can bid for such orders and is not a restraint of competition.

28. The right of first refusal in the Sealy license contract is an appropriate contractual right in an organization like the Sealy organization. Sealy, as a licensor, has an ordinary interest in having an opportuniy to acquire a licensee who desires to sell and should be allowed to bid against another prospective purchaser and to purchase one of its licensees. The right of first refusal provision allows competitive bidding for the purchase of Sealy licensees; the seller-licensee may withdraw his offer to sell after Sealy has matched the offer, decline to sell to Sealy, and thereafter receive additional bids.

29. Plaintiffs have also requested an injunction in general terms forbidding the defendant from maintaining or enforcing any "contract, combination or conspiracy which directly or indirectly has a purpose or effect of achieving or maintaining exclusive territories." No such general injunction would be appropriate in this case since the defendant is already subject to an injunction in substantially the same terms, entered against the defendant as part of the final decree in the case of *United States* v. *Sealy*, United States District Court for the Northern District of Illinois, No. 60 C 844.

*Components.*

30. Plaintiffs have requested injunctive relief with respect to various alleged practices concerning mattress components, including price-fixing, the granting to any supplier of all or any share of an exclusive market with respect to components, and collecting any payments from any supplier of components.

31. For the reasons stated above, the jury verdict cannot be deemed to have determined that any one or another of defendant's practices with respect to components constituted a violation of the antitrust laws.

32. I am unable to find that any violation with respect to components has been established as a matter of law on undisputed facts.

33. I am unable to find that there has been established any past violation of the antitrust laws that could be the basis for injunctive relief with respect to components.

34. I am likewise unable to find in defendant's practices with respect to components any threatened future violation of the antitrust laws which could be the basis for injunctive relief.

35. Plaintiffs have requested that defendant be divested of its three spring-manufacturing subsidiaries. No evidence in support of that request was presented at the evidentiary hearing on equitable relief. I find no past or threatened future violation of the antitrust laws that could be the basis for any such relief, even if such relief would be an appropriate remedy for any such violations if they were found. No evidence or legal theory has been offered to establish why the defendant may not, consistent with the antitrust laws, engage in the manufacture of mattress components, and I find that the public interest would not be served by divesting the defendant of its spring-manufacturing plants.



*Acquisitions*

36. Plaintiffs have requested that defendant be ordered to divest to plaintiffs each of the three licensees (the Florida, Philadelphia, and Pittsburgh licensees) acquired by defendant as a result of its exercise of the right to meet plaintiffs' offers for those licensees (the so-called right of first refusal), at the price at which in each case the plaintiff initially contracted to purchase those licensees.

37. The jury verdict awarding damages in the amount of $6,814,852 must be deemed to have included damages for any violation of the antitrust laws that the jury may have considered in connection with these three acquisitions, even though it is impossible to determine from the general verdict whether the jury considered one, two, or all three of such acquisitions to have been wrongful as to plaintiffs or which of the acquisitions, if less than all three, was or were wrongful as to plaintiff.

38. Accordingly, plaintiffs must be deemed to have been fully compensated by the verdict for any harm it suffered as a result of any past wrongful acts considered by the jury in connection with the three acquisitions. The compensatory damages awarded by the jury (as reduced by the remittitur accepted by the plaintiffs) will be trebled, under the mandate of the statute, in the money judgment to be entered by the Court.

39. The divestiture requested by plaintiffs would result not in "restitution" but in the double remedy for the same wrong and a double recovery, thereby unjustly enriching the plaintiffs. Such a remedy would give plaintiffs both (1) the assets it would have acquired had its proposed purchases been successful, and (2) the damages the jury determined the plaintiffs have suffered as a result of its failure to consummate the purchases.

40. For the reasons stated above, I find that there is no basis for ordering divestiture on the theory of remedying past wrongs to the plaintiffs.

41. I find that there is no other basis for requiring divestiture, either to the plaintiffs or otherwise.

42. I find that there is no other relief necessary or appropriate with respect to possible future acquisitions by the defendant. The circumstances under which the right of first refusal might be exercised at some possible time in the future would necessarily differ from the circumstances in which the past acquisitions were made. The so-called "no-sell" agreement in the Duff, Anderson program, which prohibited participating licensees from selling their businesses during the valuation phase of the program, is no longer in effect. At the hearing on equitable relief, plaintiffs presented no evidence of threatened future harm from any impending or threatened acquisitions or exercises of the right of first refusal by the defendant. Since the commencement of this lawsuit in 1971, plaintiffs have acquired two licensees, the Atlanta and Randolph licensees, without the exercise of the right of first refusal by defendant. The evidence at the hearing on equitable relief demonstrates that Ohio-Sealy's out-of-area sales are increasing every year, that its plants are more profitable than Sealy's owned and operated plants, that it has expanded the most of any Sealy licensee in the last 20 years, that its sales have almost doubled since 1970 and net profits have risen 92%, that it considers itself to be selling in all areas east of the Rockies, and that it has been a successful organization before, during, and after the lawsuit tried to the jury; its net worth has increased more than 60% from 1969 to 1975.

## *CONCLUSIONS OF LAW*

1. The Court has jurisdiction of the parties and has jurisdiction of the subject matter of this action.

2. No present or threatened future violations of the antitrust laws have been established with respect to the provisions of defendant's license agreement and no equitable relief is required with respect thereto.



3. No present or threatened future violations of the antitrust laws have been established with respect to mattress or foundation unit components and no equitable relief is required with respect thereto.

4. Plaintiffs' remedy at law is adequate and plaintiffs have been fully compensated in damages for any past wrongs related to the acquisitions by defendant of three of its licensees.

5. Divestiture to plaintiffs or to any other person is not an appropriate remedy.

6. No other equitable relief is required or appropriate.

## APPENDIX C.

ORAL RULING OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS ON DEFENDANTS' POST TRIAL MOTIONS

No. 71 C 1243

OHIO-SEALY MATTRESS MANUFACTURING CO., ET AL.

v.

SEALY, INC., ET AL.

Chief Judge James B. Parsons, Presiding

Dated May 19, 1976.

The Court: * * * This civil action was commenced on May 20th, 1971. Selection of a jury for the trial of both the amended complaint and revised supplemental complaint, as amended, and the third amended counterclaim, as amended, was begun on November 25, 1974.

Verdicts were returned on April 2nd, 1975. Judgment thereon was entered the next day. The jury found for the plaintiffs on the complaint and assessed damages in the amount of approximately $6.8 million dollars, and found for the counter-defendant on the counterclaim.

Presently pending are the defendants' motion for the entry of an order granting them judgment notwithstanding the verdict on the complaint and the defendants' and counter-claimants' motion for the entry of an order granting them a new trial on the complaint and counterclaim.

In its motion for a judgment notwithstanding the verdict, the defendants have in substance restated their motion for a directed verdict which was made at the end of the plaintiffs' case in chief and renewed at the close of their own defense.

They contend that the evidence on any one of several major allegations within the complaint was insufficient and that any one such insufficiency is fatal to the jury's general verdict on the complaint.

They further contend that the verdict is contrary to the manifest weight of the evidence and contrary to law.

In support of the motion for a new trial numerous contentions are made alternatively. It is urged that a fair trial was denied because of

(1) The Court's failure to preclude any, or at least certain, references to the case of United States v. Sealy, and

(2) The plaintiffs' improper references to a prior suit between one of the defendants and the Sealy Mattress Company of Southern California, among others; and

(3) The Court's error in denying the defendants' motion for a mistrial, and

(4) The improper, inflammatory and/or prejudicial remarks of one of plaintiffs' counsel during trial, and

(5) The improper raising of matters in the presence of the jury which properly were issues for consideration by the Court only, and

(6) The improper use of deposition testimony by one of plaintiffs' counsel, and

(7) One of plaintiffs' counsel's improper interrogation and/or argumentation with various witnesses, and

(8) The Court's error in not precluding some or all of the testimony of an expert witness called by the plaintiffs, and

(9) The Court's error in giving certain jury instructions and in refusing to give others, and

(10) The introduction of irrelevant evidence, relating to certain patents held by one of the defendants, and

(11) The cumulative effect of the improper and prejudicial conduct by plaintiff's counsel, and

(12) The jury's return of verdicts which were both contrary to law and contrary to the weight of the evidence.



## SECTION I. JUDGMENT NOTWITHSTANDING THE VERDICT

With respect to the first motion, plaintiffs contend the defendants were disabled from seeking judgment n.o.v. because they waived their motion for directed verdict.

If only because I know that there was no probability that any evidence presented during rebuttal and/or surrebuttal could have prompted this Court to grant any motion for a directed verdict, I feel that this is a proper case for the liberal construction commended by Federal Rule of Civil Procedure 1 in the interests of justice. Citing Bayamon Thom McAn, Inc. v. Miranda, 409 F. 2d 968, 972, the First Circuit, in 1969.

In my opinion, to reach any other result would be to enshrine form over substance. Citing Moran v. Raymond Corp., 484 F. 2d 1008 at 1014, Seventh Circuit, 1973, cert. denied at 415 U.S. Reports 932 in 1974.

Accordingly, the judgment n.o.v. motion is deemed to have been properly filed.

In arguing the verdict in question is contrary to law, defendants in part assert that the complaint fails to properly state a cause of action. They find it "difficult to imagine how, under any circumstances, Sealy's entire system of licensing the manufacture of Sealy products could be deemed unlawful," and suggest that the affirmance of the jury's findings of antitrust law violations "would be a large step, requiring wholly novel antitrust law and having wide repercussions on large segments of industry."

When presiding over the trial on the complaint, I proceeded upon the basis that the plaintiffs had sufficiently stated a proper cause under the statute; I do not now reverse that finding.

While this is indeed a rather novel case, I believe such an affirmance would not require wholly novel antitrust law. See, for example, U.S. v. Topco Associates, Inc., 1973-1 Trade

Cases, Section 74,185 at 94,156, Northern District of Illinois, 1973 and 1973-1 Trade Cases, Section 74,391, Northern District of Illinois, 1973, affirmed, 414 U.S. Reports, and Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F 2d 894, Fifth Circuit in 1973, and cert. denied in that case at 412 U.S. Reports 923, 1973.

Plaintiffs did allege and contend at trial that the defendants committed both so-called "per se" and "rule of reason" violations of the antitrust laws. Plaintiffs claimed that the defendants and their co-conspirators violated these laws by maintaining an aggregation of trade restraints and that none of the violations could be justified simply as a reasonable step toward implementing an otherwise valid trademark licensing system. Citing Fontana Aviation, Inc. v. Beech Aircraft Corporation, 432 2d 1080 at 1084, Seventh Circuit in 1970, cert. denied at 401 U.S. Reports 923 in 1971.

In arguing the verdict in question is contrary to law, defendants further assert that the instructions relating to the antitrust laws were erroneous. The jury was instructed that certain business practices are illegal in and of themselves. Such practices were said to include market allocation, group boycott, tying and price fixing.

The jury was also instructed that if no such practices were found to have occurred, it must then consider whether or not there occurred any restraints of trade unreasonable in actual effect or purpose. Citing U.S. v. Citizens & Southern National Bank, 422 U.S. Reports.86 in 1975.

Because the per se and rule of reason instructions were essentially agreed upon by the parties, defendants' assertions seem in large part to be improper. Rule 51 of the Federal Rules of Civil Procedure; Washington State Bowling Property Association v. Pacific Lanes, Inc., 356 F. 2d 371 at 377, Ninth Circuit, in 1966, cert. denied at 384 U.S. Reports 963 in 1966; citing further Greinke v. Yellow Cab Company, 250 F. 2d 865, 866-7. Seventh Circuit, in 1958.



The charge to the jury was not clearly erroneous. Citing Hobart, supra, 471 F. 2d at 904.

An objection was voiced to instructing the jury that certain practices are illegal. That objection was properly overruled since antitrust doctrine establishes "certain business relationships are per se violations of the Act." See U.S. v. Topco Associates, 405 U.S. 596 at 607, 1972.

The jury was instructed by agreement on which of the certain practices were alleged in this case and on what each of those practices meant. All the practices which were alleged have long been recognized as per se unreasonable, which were so instructed in the instructions to the jury, and thus capable of being violations of the antitrust laws.

Consistent with my earlier denial of plaintiffs' motion for summary judgment on the complaint, it became the jury's task to make factual determinations about the defendants' activities and thereafter to determine whether or not any of those activities sufficiently constituted any of the illicit business practices. Citing Washington State, supra, 356 F. 2d at 376.

Even if the defendants properly had assigned as error the giving or failure to give instructions relating to the antitrust laws, judgment n.o.v. would still be inappropriate.

I continue to find the instructions in question adequate expressions of the law in the case, and even if there were both proper assignments of errors and errors-in-fact in the instructions, it would still seem to me to be inconsistent with substantial justice to the plaintiffs to enter judgment n.o.v. on the complaint. See Rule 61 of the Federal Rules of Civil Procedure.

In arguing that the verdict in question is contrary to the evidence, defendants assert that the evidence, taken in the light most favorable to the plaintiffs, fails to establish either violations of the Sherman Act, whether the multitude of alleged offenses are viewed separately or in the aggregate, or any injury to the plaintiffs, assuming there were antitrust violations.

Since issues of fact are jury matters and since the Court thus should not substitute its own opinions or findings for that of the jury, defendants' motion for judgment notwithstanding the verdict should only be allowed if there were no substantial evidence whatsoever upon which the verdict and any essential finding thereunder could be based.

The task of reviewing the evidence on the complaint here was quite difficult. The amount of evidence put forth during the course of trial was voluminous. As one court has recognized, "Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors, a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices." Lind v. Schenley Industries, Inc., at 278 F. 2d 79, 90 to 91, Third Circuit in 1960, cert. denied, 364 U.S. Reports 835 in 1960.

The trial herein certainly was lengthy and complicated and dealt with many matters unfamiliar to the lay person. However, after carefully reviewing all relevant evidence on the complaint, I find that there was sufficient evidence at trial to support the jury's general verdict on the complaint.

Accordingly, although the judgment on the complaint might well have been different had the trial proceeded without a jury, the verdict on the complaint and the judgment thereon cannot now be overturned as being contrary to the evidence.

*SECOND, ITEM II, THE MOTION FOR A NEW TRIAL.*

With respect to the second motion, the movants urge me to consider all grounds put forth in support of the first motion. In accordance with my decision to entertain the first motion notwithstanding the plaintiffs' objections, such a consideration is now appropriate. Yet, in view of my ruling on the motion for judgment notwithstanding the verdict, those grounds I have



just mentioned could be found each in of itself to be insufficient to justify the entry of an order granting the movants a new trial on either the complaint or the counterclaim.

Movants urge me to consider as a ground for a new trial the introduction of irrelevant evidence relating to two particular patents held by one of the defendants.

While technically I need not consider this because of the movants' untimeliness under Rule 59(b), such a consideration should now be made in the interests of justice and notwithstanding the fact that the respondents may not have received proper notice of this ground and certainly have not had the opportunity to be heard on it.

However, though the lack of notice and opportunity to be heard is a procedural deprivation, I find it insufficient for the motion or the objection since I am of the opinion that this ground alone would not support the granting of a new trial motion.

It is urged that a new trial is necessary because of the Court's errors in giving at least four improper instructions and in refusing to give at least six properly tendered instructions. Upon due consideration, I believe that I should not reverse my earlier determination that the instructions as a whole should serve to guide a "model jury," if there be such, to a correct understanding of the questions which it was to decide and of the pertinent principles of the law it was to apply to the issues of fact. Riley v. Layton, 329 F. 2d 53 at 58, Tenth Circuit in 1964.

Another asserted basis for a new trial order is the Court's errors in allowing the testimony of Dr. Mueller, an economic expert witness, and in admitting into evidence during plaintiffs' rebuttal certain exhibits prepared by him. This was unfair to the defendant, but, again, upon due reflection, I find this, standing alone, no reason to reverse my earlier determinations.

A new trial is urged to be necessary because of both the irrelevant nature and highly prejudicial effect of the testimony

and commentary at trial regarding the case of Sealy Mattress Company of Southern California v. Sealy, Inc., 346 F. Supp. 353, Northern District of Illinois, 1972. On the matter of relevance, I remain convinced that matters with relation to the California case were woven into the fabric of the case before me, and that references to such matters were appropriate.

Prejudice, however, could lie by the manner in which such references were made.

For example, I was unsuccessful in keeping out information to the effect that I was the judge in that case, thus leaving to the jury the impression that I earlier had myself found defendants to be antitrust violators.

The question is whether the probative value of the references to the case outweigh the possible prejudicial effect on the defendant-counterclaimant or others.

After carefully reviewing those portions of the record involving the irrelevant references, I find that whatever prejudice may have occurred itself standing alone for this reason would be insufficient for granting a new trial. Rule 61 of the Federal Rules of Civil Procedure.

Similar claims of irrelevance and prejudice are voiced regarding the case of United States v. Sealy, 338 U.S. Reports 350, 1967. Again, I remain convinced that evidence of certain circumstances surrounding this earlier case was relevant to the case at bar and that if such references were carefully handled they properly should be allowed. Here, again, I tried hard to keep the references within non-prejudicial limits.

But a reading of the transcript reveals a spreading over of such references to include inferences to the jury that the Supreme Court had found the defendants to be persistent antitrust violators.

On the whole, the admission of evidence concerning this case itself and these inferences that were left into the evidence standing alone would not so deny the defendants and counter-



claimants a fair trial to the end that a new trial would be warranted.

The final and most compelling contention in support of the new trial motion involves the cumulative effect of the improper and prejudicial conduct by plaintiffs' counsel during trial. Said conduct can be said to include, inter alia, the asserted improprieties in making use of certain deposition testimony; in interrogating or arguing with certain witness; in raising various non-jury issues in the presence of the jury, and in making disparaging comments about certain adverse witness, opposing counsel and defendants.

In my opinion this contention presents the most serious argument in favor of overturning the jury's verdicts. It is clear that there was much improper and prejudicial conduct during the course of the trial. Plaintiffs admit as much when they argue that "Many of the 'venomous remarks' complained of were made in response to improper statements by counsel for National Sealy."

The question is whether or not the cumulative effect of all such conduct was so great as to affect the result of the trial and to thus deny the litigants a fair trial on the merits of their claims. At this moment I will leave that issue open.

*SECTION III. JURY TRIAL.*

Neither party raises, but sua sponte I should raise, the issue of the propriety of the trial of this case before a jury. Under our local rule a civil case is tried before a six-person jury.

This is a statutory cause of action for which I am of the opinion that a jury right is not necessarily mandated by the Constitution. There are differences of opinion on this issue which I recognize. Perhaps I should have overruled both parties and refused to permit a jury. To have done so, however, I would have had to have been, prior to trial, in a position to find and hold that this case would be beyond the practical abilities and

limitations of juries and thus this case is one that would fall outside the scope of the Seventh Amendment.

Let me footnote a quote from a compelling argument by the national authority in antitrust litigation, Attorney Francis R. Kirkham in his article on Complex Civil Litigation, written for the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.

He said:

> "Let me turn to a final topic which, at first glance, may seem to shake old foundations—the use of juries in complex civil litigation.
>
> "And since one picture is sometimes better than a thousand words, let me give you this picture:
>
> "Recently an antitrust suit charge conspiracy by three large grocery chains. The attorneys discussed the case, defendants' attorneys pointed out why they felt this suit was without merit. After what must be assumed was a fair appraisal of his case by plaintiffs' attorney, the largest of three defendants settled for less than $40,000, another for less than $50,000—each a typical nuisance settlement, as anyone familiar with antitrust litigation will recognize. The third defendant had the opportunity to make even a smaller settlement, but convinced of its innocence and unwilling to pay Danegeld, went to trial. The jury returned a verdict against it, trebled, of $30 million dollars

"It is difficult," he goes on to state, "to imagine a less appropriate mechanism for the determination of facts in a protracted and complicated suit than the civil jury. Because of the quantitative scale of most antitrust, securities and class action cases, and because the intellectual effort called for defies comprehension by a jury wholly inexperienced in the resolution of such matters, a jury is simply unqualified to participate in such cases.

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> "While the civil jury is enshrined with constitutional status in this country, The United States is the only major industrial country in the world which has preserved jury



> trial in civil cases. Juries are unknown in the European civil code countries, and in England, where the jury system originated and to whose great history we turn for a definition of our fundamental rights, trial by jury is discretionary with the judge in all but a few types of civil cases, such as libel and slander. It can hardly be concluded, therefore, that the civil jury is an indispensable element in a fair judicial system.

Nor can it reasonably be supposed that the founding fathers, when they 'preserved' the right to trial by jury in 'suits at common law, where the value shall exceed $20,' intended to mandate a jury in a modern antitrust or securities case, extending over months of trial, with complicated issues totally beyond the jury's comprehension.

"The most recent views of the Supreme Court recognize this and hold that a case beyond the 'practical ability and limitations of juries' is a case which falls outside the scope of the Seventh Amendment, just as at common law complex issues of accounting were triable without a jury.

## *SECTION V. CONDUCT OF COUNSEL.*

The conduct of counsel for Ohio-Sealy during the trial went well beyond that zeal that should have been permitted. There were remarks and acts of appeal to passion and prejudice of the jury.

There were inferences of intentional suppression of facts by defense counsel made by counsel for the plaintiff. This is one of the most unfair comments that can be made, particularly in a case in which the jury is permitted to know that the role of the plaintiff is that of a private attorney general authorized under the law to act on behalf of the general good of all the people.

What happens is that the jury that is expected to find compenstory damages if they find violations, build up an executor's distaste for the defendant, and not only more easily find viola-

tions but also find punitive damages in place of compensatory damages.

This in turn is of particular importance in a case in which Congress so expects damages to be realistic that it provided by statute a tripling of the damages to be found and preempted the act of punishment.

This record shows what may or may not have been a stratagem, but what continued to be a problem with which the Court sought endlessly to work. What I refer to is the numerous remarks made by plaintiffs' counsels that were disparaging of the defendant, its witnesses and its counsel. Characteristic of such remarks is that recited in defendants' brief regarding the statement made during the course of the testimony of the witness Claire V. Hansen:

"It is a lot harder to crack a phony story than to tell it in the first place, Judge."

Another that is also recited:

"If the Sealy organization is in favor of it is most probably illegal."

This record is exceptional as trial records go because of these types of remarks by plaintiffs' counsel in the presence of the jury.

A trial judge has difficulty managing a protracted case before a jury. Where prejudicial remarks begin to come in from counsel on one side or the other, he seeks to prevent their having an effect upon the jury's determination to be fair. He does this by being what may be called an equalizer. He calls as little attention to it as he can, while seeking to keep counsel in line.

If he speaks too severely about it he may cause the jury to dislike the attorney in error; if he speaks too easily about it, he lends value to the disparaging remarks.

When a protracted trial is punctuated by such remarks over a substantial period of time, the judge who hasn't granted a new trial and started all over reaches a point of no return, be-



yond which it is wiser to try to see the matter to its conclusion, and hope that the prejudice engendered by these things is not reflected in the verdict. He hopes that the determination of the jury is not so grossly in error or unjustified that the case cannot be salvaged.

In my re-reading the entire file and reconsidering my instructions to the jury, I am convinced that a substantial impact was made on the jury by these and other similar matters, to the end that the jury was unduly convinced that the defendant Sealy was a company which over the years had always been found and was here again found to be an "habitual" antitrust violator.

A jury with its mind so set could not easily distinguish between per se violations and the exercise of a contractual right which would violate law only if exercised as a part of an unlawful scheme to restrain competition.

The right of first refusal is just such a lawful contractual right as ought not be found to be an antitrust violation unless the jury is clearly satisfied from a preponderance of the evidence that in each instance of its exercise it was used as a part of an unlawful scheme to restrain competition.

This is the area of the case in which the plaintiffs' evidence, though sufficient to go to the jury, was so close that any nonevidentiary disposition or extra-evidentiary bias could suffice to cause it to be treated like a per se violation.

At the same time, this is the area to which the plaintiff attaches its largest claim for damages, in the amount of $6,227,294. And the jury's general verdict as to damages was less than six hundred thousand dollars more.

A careful analysis of the evidence to support the claim that with relation to the defendant's exercise of the contractual right of first refusal, the subject matter of the claim for which plaintiffs request the largest sum of damage reveals that as to one of the incidents the evidence offered to support plaintiffs' claim was speculative.

As to another incident there was no direct evidence to sustain plaintiff's claim that the defendant was acting under the contract for the express purpose of defeating the plaintiff's right and opportunity to compete.

As to the third the evidence was such that reasonable men might differ, but here again the determination of damages, if any, called for speculation.

What happened was that there was a carry-over by the jury of extra-evidentiary bias against the defendant created by these matters which I have heretofore discussed.

This trial reached the jury in the form of a competition between the personalities of lead counsel for each side. Plaintiffs' counsel was a very good counsel; he was young, brash, explosive, dramatic, exciting and at center stage at all times, even when his opponent had the floor.

Defendants' counsel is a very good counsel. He was mature, cautious, calm, matter-of-fact, and except at rare moments, courteous, even when abuse drove him to plead for help from the Court.

In a brief trial before a large jury, as in criminal cases, unless the trial court effectively keeps the jury onto the facts and the law, this kind of competition can bring about many miscarriages of justice.

When you are talking about a protracted, highly specialized litigation before a six-person jury, it is the instance of an accident when the result is, as to both violations and damages, devoid of a gross miscarriage of justice.

In the case at bar I find that as to violation a general verdict in favor of the plaintiff was by accident not a miscarriage of justice; but the impediments and irresponsibilities of the system emerged to contaminate the jury's decision on the damages. Such is a circumstance which presents itself in this case.

The size of the jury's verdict was shocking. At the time it was returned I considered it shocking and asked, "How did it